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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective.

II

PARTIES TO THE PROCEEDING

In addition to the parties shown by the caption of this case, Armando Lazaro Sanchez, Patsy Ann Stewart and Ricardo Albert Del Castillo were appellees below and are respondents here.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-6a) is unreported. The ruling of the district court suppressing evidence (App. D, *infra*, 9a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1983 (App. B, *infra*, 7a). A petition for rehearing was denied on March 4, 1983 (App. C, *infra*, 8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 2, 1981, a five-count indictment was returned in the United States District Court for the Central District of California charging all four respondents

with conspiring to possess and distribute cocaine, in violation of 21 U.S.C. 846 (Count I) (E.R. 1-3).¹ In addition, respondents were variously charged in substantive counts with the possession of cocaine (Counts II, III and V) and methaqualone (Count IV) with intent to distribute, in violation of 21 U.S.C. 841(a)(1) (E.R. 4-7). Respondents thereafter moved to suppress contraband and other evidence seized pursuant to a judicial warrant authorizing the search of residences and automobiles belonging to them (E.R. 8-9, 98-99, 108-109, 123-124, 126-127). Following an evidentiary hearing, the district court granted the motions to suppress in part, finding that the search warrant was not supported by probable cause (App. D, *infra*, 10a).² The court of appeals affirmed the suppression order, with one judge dissenting (App. A, *infra*, 1a-6a).

1. The affidavit in support of the search warrant contained the following information:³

On August 18, 1981, a confidential informant of unproven reliability told Officer Cyril A. Rombach of the Burbank, California, Police Department that two persons whom he knew as "Armando" and "Patsy" were selling large quantities of cocaine and methaqualone (quaaludes) from their residence at 620 Price Drive in Burbank (E.R. 75).⁴ In addition, the informant stated

¹ "E.R." denotes the Excerpts of Record filed in the court of appeals.

² Not all of the evidence was suppressed as to all of the respondents because the court held that no single respondent had a legitimate expectation of privacy in all of the places searched (App. D, *infra*, 10a-13a; see also page 7 note 8, *infra*).

³ For the sake of brevity, only the most pertinent details of the affidavit are recounted here; however, the affidavit contains other information tending to support the existence of probable cause (see E.R. 75-96).

⁴ According to the informant, "Armando" sold cocaine in quantities of one-half pound and larger, and "Patsy" sold methaqualone in quantities of 100 tablets and larger (E.R. 75).

that he had been present at the Price Drive residence five months earlier and had seen "Patsy" sell 500 methaqualone tablets (*ibid.*). At the same time, the informant observed a shoe box containing between \$50,000 and \$100,000 that belonged to "Patsy." Finally, the informant stated that "Patsy" and "Armando" kept only relatively small quantities of drugs at the Price Drive residence, storing the remainder at another location somewhere in the "hill area" of Burbank (*ibid.*).

On receipt of this information, Burbank police officers instituted a month-long investigation that first focused on the Price Drive residence and later on residences located at 716 South Sunset Canyon in Burbank and 7902 Via Magdalena in Los Angeles. On August 19, 1981, officers drove to the Price Drive residence and observed automobiles registered to respondents Armando Sanchez and Patsy Ann Stewart parked outside (E.R. 76). Although a records check revealed that Stewart had no prior criminal record, Sanchez had been found with \$20,000 in currency at the Miami Airport in 1977, and had been arrested in Miami in December 1978 for possession of marijuana (*ibid.*).

While surveilling the Price Drive residence on August 24, 1981, officers observed the arrival of an automobile registered to respondent Del Castillo (E.R. 77). A Latin male exited the vehicle, entered the house, and returned to the vehicle ten minutes later carrying a small paper bag. He then drove away. A background check disclosed that in January 1979 Del Castillo had been arrested in Miami for possession of 50 pounds of marijuana while he was attempting to board an aircraft bound for Los Angeles (E.R. 77-78). The telephone number for his employer that Del Castillo had given the probation authorities turned out to be registered to respondent Leon. Leon, in turn, had been arrested in 1980 on cocaine and quaalude charges and in 1979 on quaalude charges (E.R. 78-80). In addition, police offi-

cers were told by a woman who previously had been arrested with Leon that Leon was a drug importer affiliated with the "Cuban Mafia" (E.R. 78-79), and from a second informant that Leon had several thousand quaalude tablets at his residence (E.R. 79). Utility records showed that Leon lived at 716 South Sunset Canyon in Burbank (*ibid.*).

On August 25, 1981, officers observed Thomas Kilburn enter the Price Drive house and emerge a short while later carrying a paper bag (E.R. 80). The officers determined that Kilburn had been arrested in 1974 for possession of hashish and cultivation of marijuana (E.R. 80-81). On August 26, 1981, the officers observed an unidentified individual enter the Price Drive residence and emerge a short time later carrying a small box (E.R. 81).

On August 28, 1981, officers observed that Del Castillo's vehicle was driven from Price Drive to a condominium at 7902 Via Magdalena. Later that day, Sanchez drove in his vehicle from Price Drive to Leon's Sunset Canyon residence, where Sanchez obtained a small package and returned to Price Drive. Later, an unidentified man drove to the Price Drive residence and entered the house. At about the same time, a man driving Del Castillo's vehicle arrived, ran into the residence, and ran back out immediately. Sanchez then left the Price Drive house, drove to a neighboring town, parked his car, and entered an unknown house. Before surveillance was lost, Sanchez was observed returning to his car with a large rectangular container (E.R. 81-83).

On September 8, 1981, officers were surveilling a house as part of another drug investigation. They observed Patsy Stewart drive up to the house. A female left the house and entered Stewart's vehicle. One minute later, she returned to the house carrying a small paper sack. Later that day, the occupants of that house

were arrested for purchasing amphetamines from persons not related to this case (E.R. 83-84).

On September 11, 1981, the officers saw Sanchez and Stewart drive to the Los Angeles airport, where Sanchez, carrying only a small briefcase and a garment bag, boarded a flight for Miami (E.R. 84-85). Four days later, Stewart was driven to the airport in Del Castillo's automobile. Visibly upset when told that she could not carry a large suitcase on the plane with her, Stewart checked the bag and boarded a flight for Miami (E.R. 87-88). Stewart and Sanchez both returned to Los Angeles on September 19, 1981. Although they had been seated together on the plane, Stewart and Sanchez deplaned and walked through the terminal separately; they rejoined one another only near the exit to the terminal. The pair carried many pieces of carry-on luggage, most of which they had not taken to Miami. And, although they had checked at least one piece of luggage in Miami, they did not pick up any checked luggage in Los Angeles. Nor did either of them have the large suitcase that Stewart had taken with her to Florida (E.R. 90-91). As they were entering a taxi, the two were approached by airport narcotics officers who conducted a consensual search of their luggage. A small amount of marijuana was found (E.R. 91).

In the early morning hours of September 19, 1981, the officers saw a silver Chevrolet that was registered to Sanchez parked in front of Leon's house on Sunset Canyon. The vehicle was later seen at the Price Drive residence (E.R. 91-92). The officers then went to 7902 Via Magdalena, where they observed the interior lights on. This was the first time since the beginning of the investigation that the officers had seen any sign of occupancy at the condominium.⁵ Two days later, on Septem-

⁵ Investigation showed that the utilities at the Via Magdalena condominium were listed in Stewart's name, but that there was no telephone service (E.R. 89).

ber 21, Sanchez' automobile was observed parked outside the condominium (E.R. 92).

From these observations, Officer Rombach concluded that respondents were engaged in an on-going criminal enterprise involving the transportation and distribution of controlled substances (E.R. 96).⁶ In addition, Officer Rombach opined that the Via Magdalena condominium was being used as a "stash pad" to store large quantities of narcotics that were then transported in smaller amounts to respondents' residences for distribution (E.R. 89).⁷

2. Based on this information, a state superior court judge issued a warrant on September 21, 1981, authorizing the search of the residences at 620 Price Drive and 716 South Sunset Canyon, the condominium at 7902 Via Magdalena and automobiles registered to Sanchez, Stewart, Leon and Del Castillo (E.R. 65-69). In an ensuing series of searches, police officers seized more than four pounds of cocaine and 1,165 quaalude tablets at the Via Magdalena condominium, nearly a pound of cocaine at Leon's house on Sunset Canyon, and about an ounce of cocaine at the Price Drive residence of Stewart and Sanchez. The officers additionally found paraphernalia for testing, cutting and packaging cocaine, scales, a police radio and large amounts of currency (E.R. 48-64). Finally, a search of Stewart's automobile produced two garage door openers—one for the Price Drive residence and one for the Via Magdalena

⁶ Officer Rombach based his opinion on the observed behavior of the suspects assessed in light of both personal experience as a narcotics officer and specialized training in narcotics investigations (E.R. 94-95).

⁷ Officer Rombach averred that major drug dealers most often store large quantities of drugs at locations other than their primary residences to minimize the risk of seizure if their activities are detected (E.R. 89).

condominium—while a search of Del Castillo's automobile revealed a small amount of marijuana residue.

3. The district court suppressed the seized evidence, finding that there was "no question" that the reliability and credibility of the informant had not been established (App. D, *infra*, 10a). Although recognizing that "[s]ome details * * * tended to corroborate" the informant's information, the court concluded that such details either corroborated information about a stale transaction or were "as consistent with innocence as * * * with guilt" (*ibid.*). Accordingly, the court found that the search warrant was not supported by probable cause.⁸

The district court rejected the government's argument that the exclusionary rule should not apply when evidence is seized in reasonable, good-faith reliance on a search warrant (App. D, *infra*, 14a). In so doing, however, the district court specifically noted (*ibid.*):

I will say certainly in my view, there is not any question about good faith. He [Officer Rombach] went to a Superior Court judge and got a warrant; obviously laid a meticulous trail. Had surveilled for a long period of time, and I believe his testimony—and I think he said he consulted with three

⁸ The district court rejected respondents' additional claims that the description of the items to be seized in the search warrant was impermissibly overbroad and that the officers had failed to comply with the California "knock-and-announce" rule during the execution of the warrant (App. D, *infra*, 9a-10a). Moreover, the court held that only Sanchez and Stewart had a sufficient expectation of privacy to challenge the search of the Price Drive residence; that only Leon had a sufficient expectation of privacy to challenge the search of the Sunset Canyon residence; and that only Stewart and Del Castillo had a sufficient expectation of privacy to challenge the searches of their respective automobiles (*id.* at 10a-13a). No one, in the district court's view, was entitled to challenge the search of the Via Magdalena condominium (*id.* at 11a).

Deputy District Attorneys before proceeding himself, [REDACTED] and I certainly have no doubt about the fact that that is true.

4. On appeal, a panel of the Ninth Circuit affirmed the suppression order, with one judge dissenting. The majority held that the only portion of the affidavit that adequately set forth facts to demonstrate the informant's knowledge of criminal activity—the informant's personal observation of "Patsy's" distribution of drugs—was fatally stale (App. A, *infra*, 3a). The majority further held that the information supplied by the informant was inadequate under both prongs of the *Aguilar-Spinelli* test⁹ and that the month-long independent police investigation was insufficient either to corroborate the informant's information or to revive the stale information (App. A, *infra*, 3a). Finally, the majority flatly declined to recognize a "good-faith" exception to the exclusionary rule (*id.* at 4a).

In dissent, Judge Kennedy observed that "[t]he affidavit for the search warrant sets forth the details of a police investigation conducted with care, diligence, and good faith" (App. A, *infra*, 5a). Judge Kennedy concluded that the informant's information was both adequately corroborated and sufficiently current in view of the month-long surveillance, which had revealed to experienced investigators a continuous pattern of conduct that "was quite inconsistent with any explanation other than illegal drug activity" (*ibid.*).

5. The government petitioned the panel for rehearing, suggesting that the case be held pending this Court's decision in *Illinois v. Gates*, No. 81-430 (reargued Mar. 1, 1983). The petition was denied, again over Judge Kennedy's dissent (App. C, *infra*, 8a).

⁹ *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).

REASONS FOR GRANTING THE PETITION

This case raises precisely the same issue that is now pending before the Court following the reargument in *Illinois v. Gates*, No. 81-430 (reargued Mar. 1, 1983).¹⁰ We have set forth at some length our arguments in support of a "reasonable mistake" exception to the exclusionary rule in *Gates*, and no purpose would be served by repeating them here.¹¹

As noted in our supplemental brief in *Gates* (at 39-40), the Court has never articulated any rationale for applying the exclusionary rule to suppress evidence obtained pursuant to a search warrant; it has simply done so without discussing the policies to be served. Thus, in *Gates* or, alternatively, in the present case, the Court is presented with its first real occasion to examine the policies of the exclusionary rule as they relate to evidence obtained pursuant to a warrant. This question is of fundamental importance to the administration of criminal justice and, in the event the issue is not resolved in *Gates*, it should be examined by the Court in this case. Accordingly, this case will either be controlled by the decision in *Gates* or it will present a suit-

¹⁰ As in *Gates*, this case also presented the issue whether the search warrant was supported by probable cause. Although we believe that the lower courts were clearly in error in holding that probable cause was lacking in this case, we do not seek this Court's review on that issue. The probable cause issue is fact-bound and not independently worthy of this Court's consideration, particularly in light of the court of appeals' decision not to publish its opinion. We note, however, that the district court thought the question was close, observing that this was "a good case to appeal" (Jan. 11, 1981 Tr. 97), and that the court of appeals was sharply divided on the issue (App. A, *infra*, 1a-6a).

¹¹ We are furnishing respondents' counsel with copies of our supplemental brief in *Gates* (filed Jan. 13, 1983), in which those arguments are set forth.

able independent vehicle for the resolution of issues that may not be decided in *Gates*.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of the Court's decision in *Illinois v. Gates*, No. 81-430.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1983

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1093
D.C. #CR 81-907

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

ALBERTO ANTONIO LEON, ET AL.,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court
for the Central District of California
Wallace A. Tashima, District Judge, Presiding
Argued and submitted October 7, 1982

[Filed Jan. 19, 1983]

Before: KENNEDY, TANG AND FERGUSON, Circuit
Judges.

The defendants are charged with violations of 21 U.S.C. § 846 (conspiring to possess and distribute cocaine) and 21 U.S.C. § 841(a)(1) (possessing methaqualone and cocaine with intent to distribute it). The defendants filed pretrial motions in the district court to suppress evidence obtained by police officers pursuant to a search warrant issued by a state judge, arguing that the affidavit supporting the warrant made an insufficient showing of probable cause. The district court granted the motions in part, holding that the affidavit given in support of the warrant was inadequate. The government brings this interlocutory appeal challenging the district court's determination. We affirm.

The government raises three issues on appeal: (1) whether the independent examination standard is applicable to appellate review of a district court's conclusion that an affidavit does not establish probable cause for the issuance of a search warrant; (2) whether the district court erred in concluding that the search warrant affidavit failed to establish probable cause; and (3) whether the evidence seized under an invalid search warrant should be suppressed if the police acted in good faith.

In *United States v. Chesher*, 678 F.2d 1353 (9th Cir. 1982) this court recognized that a determination of whether an affidavit is sufficient to establish probable cause for the issuance of a search warrant is a question of law. *Id.* at 1359. Accordingly, we may make an independent examination of the propriety of such a determination. See, e.g., *United States v. On: Twin Engine Beech Airplane, Etc.*, 533 F.2d 1106, 1108-09 (1976).

We have independently examined the probable cause issue, and conclude that the district court correctly decided that the affidavit failed to establish probable cause sufficiently. In seeking the search warrant, the affiant relied upon the assertions of informants and independent police investigation. The information from the informants and that obtained during the investigation did not provide sufficient cause for a search of any of the structures identified in the warrant.

We consider first the propriety of the authorization to search the Price Drive residence of Sanchez and Stewart. Where an affiant relies on information provided by an informant the affidavit must first, give facts to show the reliability of the information and second, give facts to support the credibility of the informant. *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 375 U.S. 108 (1964); *United States v. Johnson*, 641 F.2d 652 (9th Cir. 1980).

The affiant adequately set forth facts to permit the judicial officer making the probable cause determination to determine the basis of the informant's knowledge of the criminal activity which occurred at the Price Drive residence. However, the information was over five months old. The long delay between the informant's acquisition of the particular information and the search negates the inference of probable cause. *Durham v. United States*, 403 F.2d 190, 195 (9th Cir. 1968). Neither are we satisfied that the independent police investigation uncovered any evidence of ongoing criminal activity at the residence which would tend to cure the staleness defect. *Cf. United States v. Huberts*, 637 F.2d 630, 638 (9th Cir. 1980), *cert. denied*, 451 U.S. 975 (1981). As the district court observed, the police observations were as indicative of innocence as of guilt.

The affidavit was also insufficient in that it failed to establish the credibility of the informant. *Aguilar v. Texas*, 378 U.S. at 114. The independent police investigation did not produce information which corroborated the details of the informant's information. *Cf. United States v. Johnson*, 641 F.2d 652, 658-59 (9th Cir. 1980).

The affidavit satisfied neither prong of the *Aguilar-Spinelli* test. Thus, the district court properly ruled that the evidence derived from the search conducted at the Price Drive residence should be suppressed.

The affidavit is clearly deficient in providing justification to search Leon's Sunset Canyon residence. One informant told police 17 months before the search that Leon was involved with the "Cuban Mafia" and that he participated in the importation of drugs into this country. Another informant told police that Leon had a quantity of quaaludes at his residence. The affidavit is devoid of any factual circumstances indicating the basis of these statements. Moreover, the affidavit completely fails to establish the veracity of either informant. Again, the independent police investigation did not un-

cover information sufficient to cure any of these defects. Thus the district court correctly ordered the suppression of evidence discovered as a result of the Sunset Canyon search.

Finally, the government invites us to follow the lead of the Fifth Circuit and recognize a "good faith" exception to the exclusionary rule. *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981). We have not heretofore recognized such an exception and we decline the invitation to recognize one at this juncture.

AFFIRMED.

Re: *United States v. Leon* —No. 82-1093

KENNEDY, Circuit Judge, dissenting:

The majority opinion states the law correctly, but, I respectfully submit, it misapplies controlling legal principles to the facts of the case.

The affidavit for the search warrant sets forth the details of a police investigation conducted with care, diligence, and good faith. It is true that the informant whose tip started the investigation had seen drugs in the house five months previously; but what the officers observed when surveillance began, together with the information obtained on the persons using the residences in question, was quite inconsistent with any explanation other than illegal drug activity. Known narcotics violators visited the principal residence in question for ten minutes or so, and would exit with a brown paper bag, usually placed in an automobile trunk. One of the persons suspected of being a principal supplier had previously been arrested for a Miami-Los Angeles transportation of drugs, and the occupants of this house traveled between those cities during this investigation.

The informant's observation pertained to ongoing criminal activity, not simply a single criminal act that was not likely to be repeated. Staleness is less significant where the activity is continuous. See *United States v. Huberts*, 637 F.2d 630, 638 (9th Cir. 1980), cert. denied, 451 U.S. 975 (1981).

Information in a warrant is not stale if the continuing course of suspicious conduct validates the information given at the outset. See *United States v. Huberts*, *supra*. That same course of conduct serves to corroborate the reliability of the informant.

One does not have to read many cases involving illegal drug traffic before it becomes clear exactly what was going on at the residences described by the officer's affidavit. The investigation described in the affida-

vit was made by a law enforcement officer with intensive training in the investigation of drug traffic. He had made over five hundred arrests. His opinion that drug trafficking was going on is itself entitled to weight, though the specific factual allegations taken alone also support the inference. The magistrate did not err, I submit, in issuing the warrant.

Whatever the merits of the exclusionary rule, its rigidities become compounded unacceptably when courts presume innocent conduct when the only common sense explanation for it is on-going criminal activity. I would reverse the order suppressing the evidence.

APPENDIX B

**OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NOTICE OF ENTRY OF JUDGMENT

Judgment was entered in this case as of the file stamp date [Jan. 19, 1983] on the attached decision of the Court.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-1093

D.C. No. CR 81-907

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

ALBERTO ANTONIO LEON, et al.,
DEFENDANTS-APPELLEES.

[Mar. 4, 1983]

ORDER

Before: KENNEDY, TANG and FERGUSON, Circuit
Judges.

The Petition for Rehearing is denied.

Judge Kennedy would grant the Petition for Rehear-
ing but hold the case on the calendar until the Supreme
Court's ruling in *Illinois v. Gates*.

APPENDIX D

RULING OF
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
ON DEFENDANTS' MOTION TO
SUPPRESS EVIDENCE

January 11, 1982

* * * * *

I might have forgotten, but my memory of Michigan v. Summers was that someone was leaving the place to be searched. But, in any event, we have more than Michigan v. Summers.

In this case, we have specific evidence relating to Mr. Leon. We have glassy eyes; someone who can't hold himself erect correctly, and someone who has a white powder around his nose; and the trained narcotics officer comes to the conclusion he has just taken cocaine—just committed a crime.

I would respectfully request it is correct. I hope that just about everything else is alluded to in my papers, and, if so, I'll sit down.

THE COURT: I do not have any questions.

All right. There are a number of motions here to suppress. I have reviewed the papers and listened to the testimony, and I am ready to rule right now. So get your pencils out.

I am going to dispose of the collateral issues first, the ones not too difficult.

First of all, I seriously doubt whether the California knock-notice statute applies to this case; even assuming it does, I find from the record that the statute was not violated.

With reference to the overbreadth argument, in a case like this with respect to conspiracy, I don't think

the warrant on conspiracy is overbroad, so I deny that argument.

With respect to the warrant itself, I read it several times, considered the affidavits and the other factors involved. I just cannot find this warrant sufficient for a showing of probable cause.

I think it is somewhere between Spinelli and Valenzuela, and probably leans toward Spinelli.

There is no question of the reliability and credibility of the informant as not being established.

Some details given tended to corroborate, maybe, the reliability of his information about the previous transaction, but if it is not a stale transaction, it comes awfully close to it; and all the other material I think is as consistent with innocence as it is with guilt.

The material referring to the other information with respect to the defendant Leon, I think is about in the same category.

If he was the one the information came from, the Police Department; but again that is information from some informant about which we know nothing.

So I just do not think this affidavit can withstand the test. I find, then, that there is no probable cause in this case for the issuance of the search warrant, which gets me to the next question of standing.

I think it is pretty clear in this case, in this Circuit, that standing is determined by federal law. I do not believe *U.S. v. Cella* has been overruled; in fact, I think it has been confirmed in *U.S. v. Portilla*, 633 Fed. 2d. 1313, 1980, which confirms that the standing rule still is to be determined by federal standards. First, with respect to I think the search of 620 Price Drive, those people who I think have standing to contest validity of that search because they have a legitimate expectation of privacy at 620 Price Drive, would be the defendants Sanchez and Stewart who have established, I think,

without contradiction, that that is their primary residence.

With respect to the search at 716 South Sunset Canyon, defendant Leon has established that that is his residence; that he is the owner of that place. So I suppress the fruits of that search, including the search of his person.

There may have been probable cause to arrest him for some state law possession of cocaine or something like that, but that was directly the result of his being detained in the course of the execution of the search warrant. So he was detained because the search warrant was being executed, and all of these other matters flowed from that detention.

So he is entitled to suppress the search of the Sunset Canyon residence.

With respect to the condominium at Via Magdalena, there is no evidence of any possessory interest. The only thing that comes close is the declaration of Patsy Ann Stewart that declares that she paid the utility bills at 7902 Via Magdalena, and had paid them for the month of September.

I don't think that is sufficient to establish a legitimate expectation of privacy.

For several years I paid the dormitory fees for my children, and I do not think I have any expectation for privacy in their dormitory rooms. So, on that standing alone, that does not give rise to an expectation of privacy.

So I find no one has standing to contest the search of 7902 Via Magdalena. So nothing uncovered there is entitled to be suppressed by these defendants.

With respect to the safe deposit box, I think that flows directly when the search of the Price Drive home, it is the direct fruit of that home—at least the key was—and, for that reason, I do not think there is any

attenuation or anything like that; so, for that reason, the results of that search should be suppressed.

So, whatever was discovered in the safe deposit box is ordered suppressed.

With respect to the automobiles, I do not know what the state of the record is. It is almost hard to tell what was searched, I would say first.

Is this correct that the Government does not intend to introduce any evidence with respect to the search of Sanchez's car? Was that the representation made in the papers?

MR. DAVIDSON: If I may have a moment, your Honor.

THE COURT: Yes.

(Mr. Davidson conferring with his case agent.)

MR. DAVIDSON: That was a correct representation, your Honor.

THE COURT: You intend to introduce evidence as a result of searches of other cars, do you not?

MR. DAVIDSON: Yes, your Honor, as to—

THE COURT: Tell me what that is.

MR. DAVIDSON: As to Mr. Del Castillo's car, there was some residue of marijuana, I believe in the trunk.

THE COURT: All right. Tell me what else.

MR. DAVIDSON: In Miss Stewart's car, there were two garage door opener transmitter devices, and one of them was the garage door opener for the Via Magdalena address.

And as to Mr. Leon's car, if I could have just one moment.

(Mr. Davidson and the agent confer further.)

There would be only two cars, your Honor—Mr. Del Castillo's car and Miss Stewart's car.

THE COURT: With respect to the fruits of those searches, I am going to suppress the results of the search because I think it's been directly—no attenuation, but again only with respect to the persons who as-

serted an interest in the automobiles; namely, Don Castillo in his own car, and Stewart in her car.

Did I leave anything out?

MR. ABZUG: Your Honor, the only thing I want to clear up for the record, as I indicated in my motion, I am also moving to suppress as a result of the arrest of Mr. Sanchez the statement he gave subsequently to the DEA as a fruit of the unlawful search.

THE COURT: Yes. That statement to me, I don't have any exception to that, so that is suppressed.

MR. ABZUG: Very well, your Honor. Thank you.

MR. COSSACK: I would ask suppression of the statement that Miss Stewart gave also, your Honor.

THE COURT: Well, Mr. Davidson, given the ruling on the warrant, do you know of any exception to suppression of the statement? I cannot think of any.

MR. DAVISON: Well, let me put it this way, you know.

I know of no difference in the facts between Mr. Sanchez and Miss Stewart.

THE COURT: Then I will also suppress the statement given by Miss Stewart in execution of the warrant.

* * * * *

I would ask, however, if either the Court would make a finding with respect to the good faith issue that the officers acted in good faith, or at least a finding, which I think is amply supported by the record on the absence of any bad faith on the part of the policemen executing the warrant.

THE COURT: First of all, let me ask you this: You recall I made some statements generally yesterday on the record when I ruled on the motion. I guess to the extent findings are useful, those would be considered findings.

I don't intend to do anything in writing. I have not requested any party to submit a proposed finding, unless somebody thinks it is necessary.

On the issue of good faith, obviously that is not the law of the Circuit, and I am not going to apply that law.

I will say certainly in my view, there is not any question about good faith. He went to a Superior Court judge and got a warrant; obviously laid a meticulous trail. Had surveilled for a long period of time, and I believe his testimony—and I think he said he consulted with three Deputy District Attorneys before proceeding himself, and I certainly have no doubt about the fact that that is true.

MR. DAVIDSON: I understand, your Honor. Thank you.

No. 82-1771

FILED
AUG 8 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v

ALBERTO ANTONIO LEON, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 29, 1983
CERTIORARI GRANTED JUNE 27, 1983

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1771

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERT ANTONIO LEON, ET AL.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

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*The opinion of the court of appeals appears in the appendix to the petition for a writ of certiorari and has not been reproduced.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RELEVANT DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
1982	
FEB. 16	DOCKETED APPEAL AND ENTERED APPEARANCES OF COUNSEL. tjs
FEB. 23	Prepared CJA 20 VOUCHER #333205 for aplt. #4 (Ricardo Del Castillo) ru
MAY 04	FILED CERTIFICATE OF RECORD. (4/6/82) js
JUN. 09	FILED ORIG. & 15 APLT/USA OPENING BRIEF, & FIVE EXCERPTS OF RECORD. (20p.) (6/7/82).
JUNE 28	FILED ORIG & 15 APLE (LEON) BRIEF. (17p. + Addendum) (6/23/82). (PINK COVERS). ff
JULY 09	RECV'D ORIG. & 15 APLE. (ARMANDO SANCHEZ) BRIEF. (24p.) (7/6/82). LATE (IN PINK COVERS) ru
JULY 13	FILED ORIG. & 15 APLE. (ARMANDO SANCHEZ) BRIEF. (24p.) (7/6/82) (IN PINK COVERS). ru
JULY 15	FILED ORIG. & 15 APLE'S (CASTILLO & STEWART) JOINT BRIEF. (30p.) (7/12/82). ru
JULY 28	FILED ORIG. & 15 APLT/USA REPLY BRIEF. (5p.) (7/26/82). ru
JULY 30	FILED (as of May 4, 1982) CERTIFIED RECORD ON APPEAL IN THREE VOLUMES; CLERK'S RECORD PLDGS VOL ONE (1-copy); REPORTER'S TRANS VOLS. TWO THRU THREE. js
OCT. 07	ARGUED AND SUBMITTED BEFORE: KENNEDY, TANG & FERGUSON, CJJ egm
1983	
JAN 13	Filed ORIG & 3 APLT/USA ADDITIONAL CITATION. (1/11/83) PANEL. ff
JAN 19	ORDERED MEMORANDUM (KENNEDY, TANG & FERGUSON, CJ) FILED & JUDG TO BE FILED & ENTD. (KENNEDY DISSENTING) pn
JAN 19	FILED MEMORANDUM—AFFIRMED.
JAN 19	FILED & ENTERED JUDGMENT. pn

- FEB 04 Filed plaintiff-appallant [sic] orig & 24 petition for rehearing. (PANEL) (7pgs) 2/2/82. ho
- MARCH 4 Filed order (KENNEDY, TANG & FERGUSON, CJ) The petition for rehearing is denied. Judge Kennedy would grant the petition for rehearing but hold the case on the calendar until the Supreme Court's ruling in ILLINOIS v. Gates. pn
- MARCH 15 Filed as of Mar. 14, aplt's (USA) application for order staying the mandate; declaration of Richard B. Kendall. (Tang) 3/10—rmc
- APRIL 4 Filed order (TANG) Upon due consideration of appellant motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before the 29th day of April, 1983, It is ordered that the motion for stay of mandate be, and the same is hereby granted. klm
- MAY 27 RECVD SC notice of filing petition for writ of cert on 4/29/83, SC#82-1771. pn
- JULY 1 Filed certified copy of SC order of 6/27/83, granting cert. (COPIES TO PANEL) pn

CENTRAL DISTRICT OF CALIFORNIA

RELEVANT DOCKET ENTRIES

Defendant: LEON, ALBERTO ANTONIO

DATE FILINGS-PROCEEDINGS

09/21/81 Defendant arrested (Dkt'd 09/28/81).

09/22/81 Defendant's first appearance (MAGISTRATE GEFLEN) (Dkt'd 09/29/81).

Filed magistrate complaint (MAGISTRATE GEFLEN) (Doc: 1) (Dkt'd 09/29/81).

Arraignment on magistrate complaint held (DFT ARRN & STAT T/N AS CHRGD MR GRITZ APPEARD AS RETD CNSL FOR DFT. DFT COMTD TO CUST OF USM.) (MAGISTRATE GEFLEN) (Dkt'd 09/29/81).

Order corporate surety/cash or in the alternative, personal appearance bail set in the amount of \$100,000.00 (W/5% CASH DEP, W/PSA, W/FULL JUST, INT PSA. DFT REST TO C/D OF CALIF, SURN PASSPORT.) (MAGISTRATE GEFLEN) (Dkt'd 09/29/81).

Preliminary examination set for 10/02/81 @ 4:30 PM (P/I ARRN SET FOR 10/13/81 @ 8:30 AM.) (MAGISTRATE GEFLEN) (Dkt'd 09/29/81).

09/24/81 Filed surety bond in the amount of \$100,000.00 (FULL JUST, W/5% CASH DEPT, W/INT PSA, SRN OF PASSPORT. (PASSPORT NOT SURN).) (MAGISTRATE GEFLEN) (Dkt'd 09/29/81).

10/02/81 Filed indictment (MAGISTRATE KRONENBERG) (Doc: 2) (Dkt'd 10/06/81).

U.S. Attorney to issue notice to appear for arraignment (MAGISTRATE KRONENBERG) (Dkt'd 10/06/81).

—FLD CR72 AUSA SAYERS (Doc: 3) (Dkt'd 10/06/81).

Order surety/cash bail set in the amount of \$100,000.00 (W/10% DEP, W/SURETY, W/PSA.) (MAGISTRATE KRONENBERG) (Dkt'd 10/06/81).

10/13/81 Arraignment held (Counts 1-4) (DFT ADVISED OF RIGHTS, DFT IS ARRN & STATES TRUE

NAME IS AS CHARGED IN INDICT.) (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Attorney KAPLAN, NORMAN added to case (FLD DESIGN OF RETAINED CNSL) (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Defendant appears with counsel (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Arraignment and plea continued to 10/13/81 @ 3:00 PM (Counts 1-4) (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Waiver of defendant's presence (FLD WAIVER OF DFT PRESENCE) (Doc: 8) (Dkt'd 10/21/81).

Arraignment held (Counts 1-4) (DFT STATE TRUE NAME AS CHARGED.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Defendant enters plea of not guilty (Counts 1-4) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Trial date set for 12/09/81 @ 9:30 AM (Counts 1-4) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Pre-trial motions to be filed by 11/19/81 (Counts 1-4) (ALL SUPPRESSION MTN SHALL BE FLD NLT) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Hearing on pre-trial motions set for 12/08/81 @ 9:30 AM (Counts 1-4) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Government to answer by 11/25/81 (RE OPPOSITION TO THE SUPPRESSION MTN) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Defendant to file reply to government's answer to pre-trial motions by 12/02/81 (RE GOVT OPPOSITION TO THE SUPPRESSION MNT.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Status hearing set for 11/12/81 @ 9:00 AM (ANY OTHER PRELIMINARY MOTNS SHALL BE FLD NLT 10/30/81. OPPOSITION TO PRELIM NTN IS DUE BY 11/6/81. GOVERN & DFTS CNSL ARE TO HOLD A DISC CONFERENCE WITHIN NEXT 10 DAYS.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

10/28/81

Joinder in Motion to reveal identity of informant (MOT #1) (Counts 1-4) (Doc: 13) (Dkt'd 10/30/81).

- 10/30/81 Joinder in Motion to produce/inspect grand jury testimony (MOT#2) (Count 2) (FLD DFT MOTN FOR JOINDER IN MOTN FOR DISCLOSURE OF INFORMANT BY G/J TEST.) (Doc: 16) (Dkt'd 11/03/81).
- 11/06/81 Memorandum in opposition to motion to reveal identity of informant (MOT#1) (FLD GOVT OPP TO MTN TO DISCLOSE IDENT OF CONFID INFORMANT, MEMO OF P/A. RETRNB 11/12/81 @ 9AM) (Doc: 21) (Dkt'd 11/16/81).
- 11/12/81 Status hearing held (RE MTN FOR DISCLOSURE OF INFORMANT INFO, MTN FOR PRE TRIAL DISC OF G/J TEST, MTN OF DFT DANCHEZ [sic] FOR CONT OF TRIAL. CRT ORD ANY MTN TO SUPPRESS SHALL BE FILED BY 12/28/81, GOVT SHALL RESP BY 1/5/82 2PM. CRT ORD GOVT SHALL TURN-OVER TO THE DFT ALL JAENCKS [sic] ACT STATEMENTS BY 12/22/81, MOT TO SUPPRESS SET FOR 1/11/82 @ 2PM.) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).
- Motion to reveal identity of informant denied (MOT#1) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).
- Motion to produce/inspect grant jury testimony granted (MOT#2) (RE PRE-TRIAL DISC OF G/J TEST CRT ORD DISCLOSURE OF G/J BE DISCLOSED BY 12/15/81). (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).
- Trial date continued to 01/12/81 [sic] @ 9:30AM (Counts 1-4) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).
- Excludable delay based on finding the ends of justice served by continuance began on 11/10/81 and ended on 01/12/82 (CONT GRANT IN ORD TO OBT OR SUBS CNSL OR GIVE REASONABLE TI TO PREPARE.) (JUDGE TASHIMA) (Dkt'd 11/18/81).
- 11/19/81 Order filed (FLD ORD FOR CONT OF TRIAL & EXCLUD TI.) (JUDGE TASHIMA) (Doc: 24) (Dkt'd 11/24/81).
- Trial date continued to 01/12/82 (Counts 1-4) (JUDGE TASHIMA) (Doc: 24) (Dkt'd 11/24/81).

Hearing on pre-trial motions continued to 01/11/82 @ 2:00PM (Counts 1-4) (ORD THAT GOVT DISCLOSE ALL GRAND JRY TRANS BY 12 PTRMOTHRGS RE ALL SUPPRESSION MTNS.) (JUDGE TASHIMA) (Doc: 24) (Dkt'd 11/24/81).

Excludable delay based on finding the ends of justice served by continuance began on 11/12/81 and ended on 01/12/82 (CONT GRANTED IN ORD TO OBT OR SUBS CONSL, OR GIVE REASONABL TI TO PREPRE.) (JUDGE TASHIMA) (Doc: 25) (Dkt'd 11/24/81).

12/23/81 Motion to suppress evidence filed (MOT#4) (Counts 1-4) (FLD DFT NOTC OF MOTN & MOTN TO QUASH S/W & TO SUPPRESS EVID OBTAINED THEREUNDER: MEMO OF P&A., RETNBL 1/11/82 @ 2PM.) (Doc: 26) (Dkt'd 12/24/81.)

Motion to suppress evidence filed (MOT#5) (Counts 1-4) (FLD DFT NOTC of MOTN & MOTN for SUPPRESSION OF EVIDENCE: DECLARA OF NORMAN J. KAPLAN & MEMO OF P&A., RETNBL 1/11/82 @ 2PM.) (Doc: 27) (Dkt'd 12/24/81)

—FLD JOINDER IN MOTNS BY DFT. (NO MOTNS FLD AT THIS TIME. (Doc: 28) (Dkt'd 12/24/81).

01/05/82 —FLD GVT'S JOINT RESPNS TO DEFENXE MOT TO DISMISS & TO SUPPRESS EVIDENCE, MEMO OF P/A, DECLARATN. RETRNBL 1/11/82, 2PM. (Doc: 32) (Dkt'd 01/06/82).

01/07/82 Filed trial memorandum (Counts 1-4) (BY GOVT.) (Doc: 33) (Dkt'd 01/11/82).

Filed government's proposed jury instructions (Counts 1-4) (Doc: 34) (Dkt'd 01/11/82).

01/11/82 Motion to suppress evidence granted in part: denied in part (MOT#4) (CRT FINDS S/W DID NOT SHOW SUFFICIENT PROBABLE CAUSE & ORD THE MOTN TO SUPPRESS GRNTD IN PART & DEN IN PART.) (JUDGE TASIMA) (Doc: 35) (Dkt'd 01/21/82).

Motion to suppress evidence granted in part: denied in part (MOT#5) (CRT FINDS S/W DID NOT

SHOW SUFFICIENT PROBABLE CAUSE &
ORD THE MOTN TO SUPPRESS GRNTD IN
PART & DEN IN PART.) (JUDGE TASHIMA)
(Doc: 35) (Dkt'd 01/21/82).

Status hearing held (HRG HLD RE: DFTS MOTNS
TO SUPPRESS & TO DISM. CRT CONT MATT
FOR TRIAL OR STAT CONF. FLD WITHN
LIST.) (JUDGE TASHIMA) (Doc: 35) (Dkt'd
01/21/82).

Status hearing continued to 01/12/82 @ 3:00 PM
(FOR TRIAL OR STAT CONF.) (JUDGE
TASHIMA) (Doc: 35) (Dkt'd 01/21/82).

—FLD DECLA IN SUPT OF MOTN TO QUASH
SW & TO SUPPRESS EVID, BY DFT. (Doc: 36)
(Dkt'd 01/21/82).

01/12/82 Status hearing held (JUDGE TASHIMA) (Doc: 39)
(Dkt'd 01/21/82).

Trial date set for 02/16/82 @ 9:30 AM (Counts 1-4)
(GOVT ORALLY MOVES FOR A CONT OF
THE TRIAL FOR 30 DAYS. CRT GRANTS
THE GOVT MOTN. THE TRIAL IS ORD
CONTD. CRT FINDS THAT THE TIME FRM
10/28 TO 11/12 IS EXCLUDABLE UNDER THE
SPEEDY TRIAL ACT DUE TO DISCV MOTNS.
(NO CR 73 SUBMTD THIS TIME). THE GOVT
IS INSTRUCTED TO PP A FORMAL ORD OF
EXCLUDABLE TIME & THE CONT OF THE
TRIAL DATE.) (JUDGE TASHIMA) (Doc: 39)
(Dkt'd 01/21/82).

Status hearing set for 02/08/82 @ 10:00 AM (IF THE
GOVT FILES A NOTC OF APPEAL PRIOR TO
THAT DATE, THE STAT CONF WILL BE
DEEMED OFF CAL.) (JUDGE TASHIMA)
(Doc: 39) (Dkt'd 01/21/82).

01/22/82 Order filed (FLD ORDER RE: EXCLUSION OF
TIME AND CONT OF TRIAL DATE) (JUDGE
TASHIMA) (Doc: 40) (Dkt'd 02/01/82).

Excludable delay due to hearings on Pretrial Motions
began on 10/28/81 and ended on 11/12/81 (JUDGE
TASHIMA) (Doc: 41) (Dkt'd 02/01/82).

02/05/82 —FLD GOVT EX PARTE APPL FOR ORD
SHORT TI, DECLAR. (Doc: 42) (Dkt'd 02/09/82).

- Order filed (RE GOVT ORD SHRT TI, TO FLE MTN TO RECONSIDER.) (JUDGE TASHIMA) (Doc: 43) (Dkt'd 02/09/82).
- Motion filed (MOT#8) (FLD GOVT NOTICE OF MTN & MTN TO RECONSIDER RULING SUPPRESING EVIDENCE, MEMO OF P/A, EXHIBIT. RETRNL 2/8/82 @ 10AM.) (Doc: 44) (Dkt'd 02/09/82).
- 02/08/82 Motion hearing held (MOT#8) (RE GOVT MTN FOR RECONSIDERATION OF RULING SUPPRESSING EVID.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- Motion denied (MOT#8) (RE GOVT MTN FOR RECONSID.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- Status hearing held (GOVT REQUEST ORD EXCLUD TI. CRT DIR GOVT TO PREPARE A FORMAL ORD FOR EXCLUSION OF TI.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- Order filed (CRT ORD TRIAL DATE OF 2/16/82 VACATED AT TI THE NOTIC OF APPEAL IS FILED.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- 02/09/82 Filed notice of interlocutory appeal (APPL#1) (FLD GVT NOTC OF AP RE ORD GRANT IN PART MTNS TO SUPPRESS.) (Doc: 45) (Dkt'd 02/11/82).
- Trial date stricken (Counts 1-4) (RE CRT ORD TO VACATE SENT AT TI OF APPEAL FILING.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- 02/12/82 Order filed (RE EXCLUSION OF TI.) (JUDGE TASHIMA) (Doc: 46) (Dkt'd 02/16/82).
- Excludable delay due to hearings on Pretrial Motions began on 02/05/82 and ended on 02/08/82 (JUDGE TASHIMA) (Doc: 47) (Dkt'd 02/16/82).
- 02/18/82 Filed transcript of proceedings for 02/08/82 (Doc: 50) (Dkt'd 02/22/82).
- 02/22/82 —(APPL#1) (FLD NTC TO APPEAR BF A MAGISTRATE. RETNB 3/3/82 @ 9:05AM BR MAG TASSOPULOS) (Doc: 51) (Dkt'd 02/23/82).
- 02/23/82 —(APPL#1) (FLD TRANSCRIPT DESIGNATION AND ORDG FORM) (Doc: 52) (Dkt'd 02/23/82).

03/12/82 Filed designation for record on appeal (LDGD USCA
ORD FOR TIME SCHED ON GOVT INTRLOC
APPEAL) (Doc: 53) (Dkt'd 03/15/82).

04/06/82 —(APPL#1) (FLD ORIG RPTR'S TRNSCRIPT OF
PROC HAD ON 1-11-82, 1-12-82) (Dkt'd 04/13/82).

* * * * *

Defendant: SANCHEZ, ARMANDO LAZARO

09/21/81 Defendant arrested (Dkt'd 09/25/81).

09/22/81 Filed magistrate complaint (Doc: 1) (Dkt'd 09/25/81).
Arraignment on magistrate complaint held (DFT
COMMITTED TO CUS OF USM, DFT APPTD
PD ROBBINS) (MAGISTRATE GEFFEN)
(Dkt'd 09/25/81).

Defendant's first appearance (Dkt'd 09/25/81).

Order corporate surety/cash or in the alternative,
personal appearance bail set in the amount of
\$75,000.00 (W/5% DEP WITH FULL JUST,
W/PSA INT, SURRENDER PASSPORT) (MAG-
ISTRATE GEFFEN) (Dkt'd 09/25/81).

Preliminary examination set for 10/02/81 @ 4:30 PM
(P/I ARRN SET FOR 10/13/81 AT 8:30 AM)
(MAGISTRATE GEFFEN) (Dkt'd 09/25/81).

09/26/81 Filed corporate surety bond in the amount of
\$75,000.00 (W/INT PSA & SURN OF PASS-
PORT, (PASSPORT NOT SURN.)) (MAGIS-
TRATE TASSOPULOS) (Dkt'd 09/29/81).

10/02/81 Filed indictment (MAGISTRATE KRONENBERG)
(Doc: 2) (Dkt'd 10/06/81).

Order corporate surety/cash bail set in the amount of
\$75,000.00 (MAGISTRATE KRONENBERG)
(Dkt'd 10/06/81).

U.S. Attorney to issue notice to appear for
arraignment (MAGISTRATE KRONENBERG)
(Dkt'd 10/06/81).

—FLD CR72 BY AUSA SAYERS, (Doc: 4) (Dkt'd
10/06/81).

10/13/81 Arraignment held (Counts 1, 3-5) (DFT ADVISED
OF RIGHTS, DFT IS ARRN & STATES
TRUE NAME IS AS CHARGED IN INDICT.)
(MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd
10/21/81).

Attorney VODNOY, JOSEPH added to case (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Defendant appears with counsel (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Arraignment and plea continued to 10/13/81 @ 3:00 PM (Counts 1, 3-5) (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Arraignment held (Counts 1, 3-5) (DFT STATE TRUE NAME AS CHARGED.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Defendant enters plea of not guilty (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Trial date set for 12/09/81 @ 9:30AM (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Pre-trial motions to be filed by 11/19/81 (Counts 1, 3-5) (ALL SUPPRESSION MTN SHALL BE FLD NLT) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Hearing on pre-trial motions set for 12/08/81 @ 9:30 AM (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Government to answer by 11/25/81 (RE OPPOSITION TO THE SUPPRESSION MTN) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Defendant to file reply to government's answer to pre-trial motions by 12/02/81 (RE GOVT OPPOSITION TO THE SUPPRESSION MNT.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Status hearing set for 11/12/81 @ 9:00 AM (ANY OTHER PRELIMINARY MOTNS SHALL BE FLD NLT 10/30/81. OPPOSITION TO PRELIM NTN IS DUE BY 11/6/81. GOVERN & DFTS CNSL ARE TO HOLD A DISC CONFERENCE WITHIN NEXT 10 DAYS.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

10/23/81 —LETTER RE: RECONVEYANCE OF DEED OF TRUST TO SEYMOUR GREITZER (Doc: 10) (Dkt'd 10/23/81).

10/30/81 Joinder in Motion to reveal identity of informant (MOT#1) (Counts 1, 3-5) (FLD DFT NOTC OF JOINDER, MOTN TO JOIN IN THE MOTNS OF CO-DFTS: DECLARA OF MICHAEL D.

ABZUG, RETNBL 11/12/81, 9AM.) (Doc: 17) (Dkt'd 11/03/81).

Joinder in Motion to produce/inspect grand jury testimony (MOT#2) (Counts 1, 3-5) (FLD DFT NOTC OF JOINDER & MOTN TO JOIN IN CO-DFTS MOTNS, DECLARA OF MICHAEL ABZUG, RETNBL 11/12/81, 9AM.) (Doc: 18) (Dkt'd 11/03/81).

11/06/81 —FLD DFT NOT OF ASSOC & CORRECTION RE MTN FOR DISCLOSURE. (Doc: 19) (Dkt'd 11/16/81).

—(MOT#1) (MOT TO REVEAL IDENT OF INFORMANT, CORRECTED TO BE HEARD ON 11/12/81 @ 9:00 AM. BEFORE JUDGE TASHIMA.) (Doc: 19) (Dkt'd 11/16/81).

Filed appearance of ABZUG, MICHAEL as co-counsel for defendant (Doc: 20) (Dkt'd 11/16/81).

Memorandum in opposition to motion to reveal identity of informant (MOT#1) (FLD GOVT OPP TO MTN TO DISCLOSE IDENT OF CONFID INFORMANT, MEMO OF P/A. RETRNBL 11/12/81 @ 9AM) (Doc: 21) (Dkt'd 11/16/81).

11/10/81 Motion for continuance filed (MOT#3) (FLD DFT MOTION FOR CONT OF TRIAL, DECLAR OF CNSL & MEMO OF P/A, RETRNBL 11/12/81 @ 9AM.) (Doc: 22) (Dkt'd 11/16/81).

11/12/81 Status hearing held (RE MTN FOR DISCLOSURE OF INFORMANT INFO, MTN FOR PRE TRIAL DISC OF G/J TEST, MTN OF DFT DANCHEZ [sic] FOR CONT OF TRIAL. CRT ORD ANY MTN TO SUPPRESS SHALL BE FILED BY 12/28/81, GOVT SHALL RESP BY 1/5/82 2PM. CRT ORD GOVT SHALL TURN-OVER TO THE DFT ALL JAENCKS [sic] ACT STATEMENTS BY 12/22/81, MOT TO SUPPRESS SET FOR 1/11/82 @ 2PM.) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).

Motion to reveal identity of informant denied (MOT#1) (JUDGE TASHIMA) (DOC: 23) (Dkt'd 11/18/81).

Motion to produce/inspect grand jury testimony granted (MOT#2) (RE PRE-TRIAL DISC OF G/J TEST CRT ORD DISCLOSURE OF G/J BE DIS-

CLOSED BY 12/15/81.) (JUDGE TASHIMA)
(Doc: 23) (Dkt'd 11/18/81).

Motion for continuance granted (MOT#3) (JUDGE
TASHIMA) (Doc: 23) (Dkt'd 11/18/81).

Trial date continued to 01/12/81 [sic] @ 9:30AM
(Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 23)
(Dkt'd 11/18/81).

Excludable delay based on finding the ends of justice
served by continuance began on 11/10/81 and
ended on 01/12/82 (CONT GRANT IN ORD TO
OBT OR SUBS CNSL OR GIVE REASONABLE
TI TO PREPARE.) (JUDGE TASHIMA) (Dkt'd
11/18/81).

11/19/81 Order filed (FLD ORD FOR CONT OF TRIAL &
EXCLUD TI.) (JUDGE TASHIMA) (Doc: 24)
(Dkt'd 11/24/81).

Trial date continued to 01/12/82 (Counts 1, 3-5)
(JUDGE TASHIMA) (Doc: 24) (Dkt'd 11/24/81).

Hearing on pre-trial motions continued to 01/11/82 @
2:00 PM (Counts 1, 3-5) (ORD THAT GOVT DIS-
CLOSE ALL GRAND JRY TRANS BY 12
PTRMOTHGRS RE ALL SUPPRESSION
MTNS.) (JUDGE TASHIMA) (Doc: 24) (Dkt'd
11/24/81).

Excludable delay based on finding the ends of justice
served by continuance began on 11/12/81 and
ended on 01/12/82 (CONT GRANTED IN ORD TO
OBT OR SUBS CONSL, OR GIVE
REASONABL TI TO PREPARE.) (JUDGE
TASHIMA) (Doc: 25) (Dkt'd 11/24/81).

01/05/82 —FLD GVT'S JOINT RESPNS TO DEFENSE
MOT TO DISMISS & TO SUPPRESS EVID-
ENCE, MEMO OF P/A, DECLARATN.
RETRNBL 1/11/82, 2PM. (Doc: 32) (Dkt'd
01/06/82).

01/07/82 Filed trial memorandum (Counts 1, 3-5) BY GOVT.)
(Doc: 33) (Dkt'd 01/11/82).

Filed government's proposed jury instructions
(Counts 1, 3-5) (Doc: 34) (Dkt'd 01/11/82).

01/11/82 Status hearing held (HRG HLD RE: DFT SMOTNS
TO SUPPRESS & TO DISM. CRT CONT MATF
FOR TRIAL OR STAT CONF. FLD WITN
LIST.) (JUDGE TASHIMA) (Doc: 35) (Dkt'd
01/21/82).

Status hearing continued to 01/12/82 @ 3:00 PM
(FOR TRIAL OR STAT CONF.) (JUDGE
TASHIMA) (Doc: 35) (Dkt'd 01/21/82).

01/12/82 Status hearing held (JUDGE TASHIMA) (Doc: 39)
(Dkt'd 01/21/82).

Trial date set for 02/16/82 @ 9:30 AM (Counts 1, 3-5)
(GOVT ORALLY MOVES FOR A CONT OF
THE TRIAL FOR 30 DAYS. CRT GRNTS THE
GOVT MOTN. THE TRIAL IS ORD CONTD.
CRT FINDS THAT THE TIME FRM 10/28 TO
11/12 IS EXCLUDABLE UNDER THE
SPEEDY TRIAL ACT DUE TO DISCV MOTNS.
(NO CR 73 SUBMTD THIS TIME). THE GOVT
IS INSTRUCTED TO PP A FORMAL ORD OF
EXCLUDABLE TIME & THE CONT OF THE
TRIAL DATE.) (JUDGE TASHIMA) (Doc: 39)
(Dkt'd 01/21/82).

Status hearing set for 02/08/82 @ 10:00 AM (IF THE
GOVT FILES A NOTC OF APPEAL PRIOR TO
THAT DATE, THE STAT CONF WILL BE
DEEMED OFF CAL.) (JUDGE TASHIMA)
(Doc: 39) (Dkt'd 01/21/82).

01/22/82 Order filed (FLD ORDER RE: EXCLUSION OF
TIME AND CONT OF TRIAL DATE) (JUDGE
TASHIMA) (Doc: 40) (Dkt'd 02/01/82).

Excludable delay due to hearings on Pretrial Motions
began on 10/28/81 and ended on 11/12/81 (JUDGE
TASHIMA) (Doc: 41) (Dkt'd 02/01/82).

02/05/82 —FLD GOVT EX PARTE APPL FOR ORD
SHORT TI, DECLAR. (Doc: 42) (Dkt'd 02/09/82).

Order filed (RE GOVT ORD SHRT TI, TO FLE
MTN TO RECONSIDER.) (JUDGE TASHIMA)
(Doc: 43) (Dkt'd 02/09/82).

Motion filed (MOT#8) (FLD GOVT NOTICE OF
MTN & MTN TO RECONSIDER RULING SUP-
PRESSING EVIDENCE, MEMO OF P/A, EX-
HIBIT. RETRNBL 2/8/82 @ 10AM.) (Doc: 44)
(Dkt'd 02/09/82).

02/08/82 Status hearing held (RE GOVT MTN FOR RECON-
SIDERATION OF RULING SUPPRESS EVID.
GOVT REQUESTS ORD EXCLUD TI. CRT DI-
RECTS GOVT TO PREPARE A FORMAL ORD
FOR EXCLUSION OF TI.) (JUDGE TASHIMA)
(Doc: 48) (Dkt'd 02/16/82).

- Motion denied (MOT#8) (RE DFT MTN FOR RECONSID.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- Bail hearing set for 02/16/82 @ 9:30AM (RE BAIL MODIF.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- Order filed (CRT ORD TRIAL DATE VACATED AT TI THE NOTIC OF APPEAL IS FILD.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- 02/09/82 Filed notice of interlocutory appeal (APPL#1) (FLD GVT NOTC OF AP RE ORD GRANT IN PART MTNS TO SUPPRESS.) (Doc: 45) (Dkt'd 02/11/82).
- Trial date stricken (Counts 1, 3-5) (RE ORD TO VACATE TRIAL DATE AT TI NOTIC OF APPEAL.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- 02/12/82 Order filed (RE EXCLUSION OF TI.) (JUDGE TASHIMA) (Doc: 46) (Dkt'd 02/16/82).
- Excludable delay due to hearings on Pretrial Motions began on 02/05/82 and ended on 02/08/82 (JUDGE TASHIMA) (Doc: 47) (Dkt'd 02/16/82).
- 02/16/82 Bail hearing stricken (CNSEL INFRM CRT THAT BAIL MATTER SHALL BE HANDLED BY STIP.) (JUDGE TASHIMA) (Doc: 49) (Dkt'd 02/17/82).
- 02/18/82 Filed transcript of proceedings for 02/08/82 (Doc: 50) (Dkt'd 02/22/82).
- 02/22/82 —(APPL#1) (FLD NTC TO APPEAR BF A MAG. RETNB 3/3/82 @ 9:05AM BF MAG TASSOPULOS) (Doc: 51) (Dkt'd 02/23/82).
- 02/23/82 —(APPL#1) (FLD TRANSCRIPT DESIGNATION AND ORDG FORM) (Doc: 52) (Dkt'd 02/23/82).
- 03/12/82 Filed designation for record on appeal (LDGD USCA ORD FOR TIME SCHED ON GVT INTRLOC APPEAL) (Doc: 53) (Dkt'd 03/15/82).
- 04/06/82 (APPL#1) (FLD ORIG RPTR'S TRNSCRIPT OF PROC HAD ON 1-11-82, 1-12-82.) (Dkt'd 04/13/82).

* * * * *

Defendant: STEWART, PATSY ANN

09/21/81 Defendant arrested (Dkt'd 09/29/81).

- 09/22/81 Defendant's first appearance (MAGISTRATE GEFFEN) (Dkt'd 09/29/81).
 Filed magistrate complaint (MAGISTRATE GEFFEN) (Doc: 1) (Dkt'd 09/29/81).
 Arraignment on magistrate complaint held (DFT ARRN & STAT T/N AS CHRGD. CRT APPTD A. MABRY AS CNSL. DFT COMTD TO CUST OF USM.) (MAGISTRATE GEFFEN) (Dkt'd 09/29/81).
 Order corporate surety/cash or in the alternative, personal appearance bail set in the amount of \$25,000.00 (W/10% DEP, W/FULL JUST, DFT RESTD TO L.A. CNTY. DFT TO HV 48 HRS TO JUST & POST CASH DEP.) (MAGISTRATE GEFFEN) (Dkt'd 09/29/81).
 Preliminary examination set for 10/02/81 @ 4:30 PM (P/I ARRN SET FOR 10/13/81 @ 8:30AM.) (MAGISTRATE GEFFEN) (Dkt'd 09/29/81).
 Filed corporate surety bond in the amount of \$25,000.00 (DFT REST TO L.A. CNTY.) (MAGISTRATE GEFFEN) (Dkt'd 09/29/81).
- 10/02/81 Filed indictment (MAGISTRATE KRONENBERG) (Doc: 2) (Dkt'd 10/06/81).
 Order surety/cash bail set in the amount of \$25,000.00 (W/10% DEP, W/ SURETY, W/PSA.) (MAGISTRATE KRONENBERG) (Dkt'd 10/06/81).
 U.S. Attorney to issue notice to appear for arraignment (MAGISTRATE KRONENBERG) (Dkt'd 10/06/81).
 —FLD CR72 BY AUSA SAYERS (Doc: 5) (Dkt'd 10/06/81).
- 10/13/81 Arraignment held (Counts 1, 3-5) (DFT ADVISED OF RIGHTS, DFT IS ARRGD & STATES TRUE NAME IS AS CHARGED IN INDICT.) (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).
 Attorney COSSACK, ROGER L added to case (FLD DESIGN OF RETAIN CNSL) (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).
 Defendant appears with counsel (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Arraignment and plea continued to 10/13/81 @ 3:00 PM (Counts 1, 3-5) (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Arraignment held (Counts 1, 3-5) (DFT STATE TRUE NAME AS CHARGED.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Defendant enters plea of not guilty (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Trial date set for 12/09/81 @ 9:30 AM (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Pre-trial motions to be filed by 11/19/81 (Counts 1, 3-5) (ALL SUPPRESSION MTN SHALL BE FLD NLT) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Hearing on pre-trial motions set for 12/08/81 @ 9:30 AM (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Government to answer by 11/25/81 (RE OPPOSITION TO THE SUPPRESSION MTN) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Defendant to file reply to government's answer to pre-trial motions by 12/02/81 (RE GOVT OPPOSITION TO THE SUPPRESSION MNT.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Status hearing set for 11/12/81 @ 9:00 AM (ANY OTHER PRELIMINARY MOTNS SHALL BE FLD NLT 10/30/81. OPPOSITION TO PRELIM NTN IS DUE BY 11/6/81. GOVERN & DFTS CNSL ARE TO HOLD A DISC CONFERENCE WITHIN NEXT 10 DAYS.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

10/28/81

—FLD DFT NOTICE OF JOINDER. NO MTNS TO JOIN IN ON FLD. (Doc: 11) (Dkt'd 10/30/81)

Motion to reveal identity of informant filed (MOT#1) (Counts 1, 3-5) (FLD DFT MTN FOR DISCLOSURE OF INFORMANT INFO, MEMO OF P/A.) (Doc: 12) (Dkt'd 10/30/81).

Motion to reveal identity of informant hearing set for 11/12/81 @ 9:00 AM (MOT#1) (ORD THAT DFT MOTN SHL BE HRD ON SD DATE.) (JUDGE TASHIMA) (Doc: 14) (Dkt'd 11/03/81).

11/06/81

Memorandum in opposition to motion to reveal identity of informant (MOT#1) (FLD GOVT OPP TO

MTN TO DISCLOSE IDENT OF CONFID INFORMANT, MEMO OF P/A. RETRNBL 11/12/81 @ 9AM) (Doc: 21) (Dkt'd 11/16/81).

11/12/81

Status hearing held (RE MTN FOR DISCLOSURE OF INFORMANT INFO, MTN FOR PRE TRIAL DISC OF G/J TEST, MTN OF DFT DANCHEZ [sic] FOR CONT OF TRIAL. CRT ORD ANY MTN TO SUPPRESS SHALL BE FILED BY 12/23/81, GOVT SHALL RESP BY 1/5/82 2PM. CRT ORD GOVT SHALL TURN-OVER TO THE DFT ALL JAENCKS [sic] ACT STATEMENTS BY 12/22/81, MOT TO SUPPRESS SET FOR 1/11/82 @ 2PM.) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).

Motion to reveal identity of informant hearing held (MOT#1) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).

Motion to reveal identity of informant denied (MOT#1) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).

Trial date continued to 01/12/81 [sic] @ 9:30 AM (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).

Excludable delay based on finding the ends of justice served by continuance began on 11/10/81 and ended on 01/12/82 (CONT GRANT IN ORD TO OBT OR SUBS CNSL OR GIVE REASONABLE TI TO PREPARE.) (JUDGE TASHIMA) (Dkt'd 11/18/81).

11/19/81

Order filed (FLD ORD FOR CONT OF TRIAL & EXCLUD TI (JUDGE TASHIMA) (Doc: 24) (Dkt'd 11/24/81).

Trial date continued to 01/12/82 (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 24) (Dkt'd 11/24/81).

Hearing on pre-trial motions continued to 01/11/82 @ 2:00 PM (Counts 1, 3-5) (ORD THAT GOVT DISCLOSE ALL GRAND JRY TRANS BY 12 PTRMOTHRGS KE ALL SUPPRESSION MTNS.) (JUDGE TASHIMA) (Doc: 24) (Dkt'd 11/24/81).

Excludable delay based on finding the ends of justice served by continuance began on 11/12/81 and ended on 01/12/82 (CONT GRANTED IN ORD TO OBT OR SUBS CNSL, OR GIVE

- REASONABLE TIME TO PREPARE.) (JUDGE TASHIMA) (Doc: 25) (Dkt'd 11/24/81).
- 12/23/81 Motion to dismiss filed (MOT#6) (Counts 1, 3-5) (FLD DFT MTN TO DISMISS INDICT, MEMO OF P/A, RETRN 1/11/82 @ 2PM.) (Doc: 29) (Dkt'd 12/28/81).
- 01/05/82 —FLD GVT'S JOINT RESPNS TO DEFENSE MOT TO DISMISS & TO SUPPRESS EVIDENCE, MEMO OF P/A, DECLARATN. RETRNBL 1/11/82, 2PM. (Doc: 32) (Dkt'd 01/06/82).
- 01/07/82 Filed trial memorandum (Counts 1, 3-5) (BY GOVT.) (Doc: 33) (Dkt'd 01/11/82).
Filed government's proposed jury instructions (Counts 1, 3-5) (Doc: 34) (Dkt'd 01/11/82).
- 01/11/82 Motion to dismiss denied (MOT#6) (JUDGE TASHIMA) (Doc: 35) (Dkt'd 01/21/82).
Status hearing held (HRG HLD RE: DFT SMOTNS TO SUPPRESS & TO DISM. CRT CONT MATT FOR TRIAL OR STAT CONF. FLD WITN LIST.) (JUDGE TASHIMA) (Doc: 35) (Dkt'd 01/21/82).
Status hearing continued to 01/12/82 @ 3:00 PM (FOR TRIAL OR STAT CONF.) (JUDGE TASHIMA) (Doc: 35) (Dkt'd 01/21/82).
—FLD DFT DECLARA OF PATSY ANN STEWART. RE: STANDING. (Doc: 37) (Dkt'd 01/21/82).
—FLD DECLARA OF PATSY ANN STEWART RE: STANDING. (Doc: 38) (Dkt'd 01/21/82).
- 01/12/82 Status hearing held (JUDGE TASHIMA) (Doc: 39) (Dkt'd 01/21/82).
Trial date set for 02/16/82 @ 9:30 AM (Counts 1, 3-5) (GOVT ORALLY MOVES FOR A CONT OF THE TRIAL FOR 30 DAYS. CRT GRNTS THE GOVT MOTN. THE TRIAL IS ORD CONTD. CRT FINDS THAT THE TIME FRM 10/28 to 11/12 IS EXCLUDABLE UNDER THE SPEEDY TRIAL ACT DUE TO DISCV MOTNS. (NO CR 73 SUBMTD THIS TIME). THE GOVT IS INSTRUCTED TO PP A FORMAL ORD OF EXCLUDABLE TIME & THE CONT OF THE TRIAL DATE.) (JUDGE TASHIMA) (Doc: 39) (Dkt'd 01/21/82).

- Status hearing set for 02/08/82 @ 10:00 AM (IF THE GOVT FILES A NOTC OF APPEAL PRIOR TO THAT DATE, THE STAT CONF WILL BE DEEMED OFF CAL.) (JUDGE TASHIMA) (Doc: 39) (Dkt'd 01/21/82).
- 01/22/82 Order filed (FLD ORDER RE: EXCLUSION OF TIME AND CONT OF TRIAL DATE) (JUDGE TASHIMA) (Doc: 40) (Dkt'd 02/01/82).
- Excludable delay due to hearings on Pretrial Motions began on 10/28/81 and ended on 11/12/81 (JUDGE TASHIMA) (Doc: 41) (Dkt'd 02/01/82).
- 02/05/82 —FLD GOVT EX PARTE APPL FOR ORD SHORT TI, DECLAR. (Doc: 42) (Dkt'd 02/09/82).
- Order filed (RE GOVT ORD SHRT TI, TO FLE MTN TO RECONSIDER.) (JUDGE TASHIMA) (Doc: 43) (Dkt'd 02/09/82).
- Motion filed (MOT#8) (FLD GOVT NOTICE OF MTN & MTN TO RECONSIDER RULING SUPPRESSING EVIDENCE, MEMO OF P/A, EXHIBIT. RETRNL 2/8/82 @ 10AM.) (Doc: 44) (Dkt'd 02/09/82).
- 02/08/82 Status hearing held (RE GOT MTN FOR RECONSID OF RULING SUPPRESS EVID. GOVT REQUEST AN ORD EXCLUD TI. CRT DIR GOVT TO PREPARE A FORMAL ORD FOR EXCLUS OF TI.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- Motion denied (MOT#8) (RE GOVT MTN FOR RECONSID.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- Order filed (CRT ORD TRIAL DATE VACATED AT TI NOTC OF APPEAL IS FILED.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- 02/09/82 Filed notice of interlocutory appeal (APPL#1) (FLD GVT NOTC OF AP RE ORD GRANT IN PART MTNS TO SUPPRESS.) (Doc: 45) (Dkt'd 02/11/82).
- Trial date stricken (Counts 1, 3-5) (RE CRT ORD TO VACATE TRIAL DATE AT TIME OF NOTC OF APPEAL FILING.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- 02/12/82 Order filed (RE EXCLUSION OF TI.) (JUDGE TASHIMA) (Doc: 46) (Dkt'd 02/16/82).

- Excludable delay due to hearings on Pretrial Motions began on 02/05/82 and ended on 02/08/82 (JUDGE TASHIMA) (Doc: 47) (Dkt'd 02/16/82).
- 02/18/82 Filed transcript of proceedings for 02/08/82 (Doc: 50) (Dkt'd 02/22/82).
- 02/22/82 —(APPL#1) (FLD NTC TO APPEAR BF A MAG. RETNB 3/3/82 @ 9:05AM BF MAG TASSOPULOS) (Doc: 51) (Dkt'd 02/23/82.)
- 02/23/82 —(APPL#1) (FLD TRANSCRIPT DESIGNATION AND ORDG FORM) (Doc: 52) (Dkt'd 02/23/82).
- 03/12/82 Filed designation for record on appeal (LDGD USCA ORD FOR TIME SCHED ON GOVT INTERLOC APPEAL) (Doc: 53) (Dkt'd 03/15/82).
- 04/06/82 —(APPL#1) (FLD ORIG RPTR'S TRNSCRIPT FOR PROC HAD ON 1-11-82, 1-12-82.) (Dkt'd 04/13/82).

* * * * *

Defendant: DEL CASTILLO, RICHARD ALBERT

- 09/21/81 Defendant arrested (Dkt'd 09/25/81).
Defendant's first appearance (Dkt'd 09/25/81)
- 09/22/81 Filed magistrate complaint (MAGISTRATE GEFFEN) (Doc: 1) (Dkt'd 09/25/81).
Arraignment on magistrate complaint held (DEFT ARRND & COMM TO CUST USM. CRT APPTD JAMES, CJA, AS CNSL.) (MAGISTRATE GEFFEN) (Dkt'd 09/25/81).
Order corporate surety/cash or in the alternative, personal appearance bail set in the amount of \$50,000.00 (W/5% DEP, FULL JUSTIF, INT PSA SUPV. RESTR TO LA CTY) (MAGISTRATE GEFFEN) (Dkt'd 09/25/81).
Preliminary examination set for 10/02/81 @ 4:30 PM (PIA SET FOR 10/13/81 @ 8:30AM) (MAGISTRATE GEFFEN) (Dkt'd 09/25/81).
- 09/30/81 Filed corporate surety bond in the amount of \$50,000.00 (W/SURN OF PASSPORT W) (MAGISTRATE KRONENBERG) (Dkt'd 10/02/81).
- 10/02/81 Filed indictment (MAGISTRATE KRONENBERG) (Doc: 2) (Dkt'd 10/06/81).
Order corporate surety/cash bail set in the amount of \$50,000.00 (MAGISTRATE KRONENBERG) (Dkt'd 10/06/81).

U.S. Attorney to issue notice to appear for arraignment (MAGISTRATE KRONENBERG) (Dkt'd 10/06/81).

—FLD CR72 BY AUSA SAYERS, DFT IN CUSTODY IN TI, SOLELY ON THIS CHARGE. DATE AND TIME OF ARREST 9/21/81. (Doc: 6) (Dkt'd 10/06/81).

10/13/81

Arraignment held (Counts 1, 3-5) (DFT ADVISED OF RIGHTS, DFT IS ARGN & STATES TRUE NAME IS AS CHARGED IN INDICT.) (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Order appointing attorney LICHTMAN, JAY to represent defendant (FLD CJA FRM 23) (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Defendant appears with counsel (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Arraignment and plea continued to 10/13/81 @ 3:00 PM (Counts 1, 3-5) (MAGISTRATE REICHMANN) (Doc: 7) (Dkt'd 10/21/81).

Arraignment held (Counts 1, 3-5) (DFT STATE TRUE NAME AS CHARGED.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Defendant enters plea of not guilty (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Trial date set for 12/09/81 @ 9:30 AM (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Pre-trial motions to be filed by 11/19/81 (Counts 1, 3-5) (ALL SUPPRESSION MTN SHALL BE FLD NLT) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Hearing on pre-trial motions set for 12/08/81 @ 9:30 AM (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Government to answer by 11/25/81 (RE OPPOSITION TO THE SUPPRESSION MTN) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Defendant to file reply to government's answer to pre-trial motions by 12/02/81 (RE GOVT OPPOSITION TO THE SUPPRESSION MNT.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

Status hearing set for 11/12/81 @ 9:00 AM (ANY OTHER PRELIMINARY MOTNS SHALL BE FLD NLT 10/30/81. OPPOSITION TO PRELIM NTN IS DUE BY 11/6/81. GOVERN & DFTS CNSL ARE TO HOLD A DISC CONFERENCE WITHIN NEXT 10 DAYS.) (JUDGE TASHIMA) (Doc: 9) (Dkt'd 10/21/81).

10/30/81 Motion to produce/inspect grand jury testimony filed (MOT#2) (Counts 1, 3-5) (FLD DFT NOTC OF MOTN & MOTN FOR P/T DISCV OF G/J TEST: MEMO OF P&A:DECLARA, RETNBL 11/12/81, 9AM.) (Doc: 15) (Dkt'd 11/03/81.)

—(MOT#2) (FLD DFT MOTN FOR & IN SUPPLMT TO MOTN FOR P/T DISCV OF INFORMANT INFORMATION, DECLARA,, RETNBL 11/12/81, 9AM.) (Doc: 16) (Dkt'd 11/03/81).

Joinder in Motion to reveal identity of informant (MOT#1) (Count 1) (FLD DFT MOTN FOR JOIN IN DFT STEWART MOTN FOR REVEAL IDENTITY OF INFORMANT FOR DISCLOSURE OF INFORMANT FOR DISCLOSURE OF INFORMANT INFO., RETNBL 11/12/81, 9AM.) (Doc: 16) (Dkt'd 11/03/81).

11/06/81 Memorandum in opposition to motion to reveal identity of informant (MOT#1) (FLD GOVT OPP TO MTN TO DISCLOSE IDENT OF CONFID INFORMANT, MEMO OF P/A. RETRNBL 11/12/81 @ 9AM) (Doc: 21) (Dkt'd 11/16/81).

11/12/81 Status hearing held (RE MTN FOR DISCLOSURE OF INFORMANT INFO, MTN FOR PRE TRIAL DISC OF G/J TEST, MTN OF DFT DANCHEZ [sic] FOR CONT OF TRIAL. CRT ORD ANY MTN TO SUPPRESS SHALL BE FILED BY 12/28/81, GOVT SHALL RESP BY 1/5/82 2PM. CRT ORD GOVT SHALL TURN OVER TO THE DFT ALL JAENCKS [sic] ACT STATEMNTS BY 12/22/81, MOT TO SUPPRESS SET FOR 1/11/82 @ 2PM.) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).

Motion to reveal identity of informant denied (MOT#1) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).

Motion to produce/inspect grand jury testimony granted (MOT#2) (RE PRE-TRIAL DISC OF G/J TEST CRT ORD DISCLOSURE OF G/J BE DISCLOSED BY 12/15/81.) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).

Trial date continued to 01/12/81 [sic] @ 9:30 AM (Counts 1, 3-5) (JUDGE TASHIMA) (Doc: 23) (Dkt'd 11/18/81).

Excludable delay based on finding the ends of justice served by continuance began on 11/10/81 and ended on 01/12/82 (CONT GRANT IN ORD TO OBT OR SUBS CNSL OR GIVE REASONABLE TI TO PREPARE.) (JUDGE TASHIMA) (Dkt'd 11/18/81).

11/19/81 Order filed (FLD ORD FOR CONT OF TRIAL & EXCLUD TI.) (JUDGE TASHIMA) (Doc: 24) (Dkt'd 11/24/81).

Trial date continued to 01/12/82 (Counts 1, 3-5) (JUDGE TASHIMA). (Doc: 24) (Dkt'd 11/24/81).

Hearing on pre-trial motions continued to 01/11/82 @ 2:00 PM (Counts 1, 3-5) (ORD THAT GOVT DISCLOSE ALL GRAND JRY TRANS BY 12 PTRMOTHRGS RE ALL SUPPRESION MTNS.) (JUDGE TASHIMA) (Doc: 24) (Dkt'd 11/24/81).

Excludable delay based on finding the ends of justice served by continuance began on 11/12/81 and ended on 01/12/82 (CONT GRANTED IN ORD TO OBT OR SUBS CONSL, OR GIVE REASONABL TI TO PREPARE.) (JUDGE TASHIMA) (Doc: 25)(Dkt'd 11/24/81).

12/23/81 Joinder in Motion to dismiss (MOT#6) (Counts 1, 3-5) (FLD DFT NOTC OF MOT FOR JOINDER IN MOT/DISM FLD 12/23/81) (Doc: 30) (Dkt'd 12/29/81).

Motion to suppress evidence filed (MOT#7) (Counts 1, 3-5) (FLD DFT NOTC & MOT/SUPPRESS EVID, P/A, DECLS, APPENDICES. RETRNB 1-11-82 @ 2PM) (Doc: 31) (Dkt'd 12/29/81).

01/05/82 —FLD GVT'S JOINT RESPNS TO DEFENXE MOT TO DISMISS & TO SUPPRESS EVIDENCE, MEMO OF P/A, DECLARATN.

RETRNBL 1/11/82, 2PM. (Doc: 32) (Dkt'd 01/06/82).

01/07/82 Filed trial memorandum (Counts 1, 3-5) (BY GOVT.) (Doc: 33) (Dkt'd 01/11/82).

Filed government's proposed jury instructions (Counts 1, 3-5) (Doc: 34) (Dkt'd 01/11/82).

01/11/82 Motion to dismiss denied (MOT#6) (JUDGE TASHIMA) (Doc: 35) (Dkt'd 01/21/82).

Motion to suppress evidence granted in part: denied in part (MOT#7) (CRT FINDS THE S/W DID NOT SHOW SUFFICIENT PROBABLE CAUSE & ORD THE MOTN TO SUPPRESS GRNTD IN PART & DEN IN PART.) (JUDGE TASHIMA) (Doc: 35) (Dkt'd 01/21/81).

Status hearing held (HRG HLD RE: DFT SMOTNS TO SUPPRESS & TO DISM. CRT CONT MATT FOR TRIAL OR STAT CONF. FLD WITN LIST.) (JUDGE TASHIMA) (Doc: 35) (Dkt'd 01/21/82).

Status hearing continued to 01/12/82 @ 3:00 PM (FOR TRIAL OR STAT CONF.) (JUDGE TASHIMA) (Doc: 35) (Dkt'd 01/21/82).

01/12/82 Status hearing held (JUDGE TASHIMA) (Doc: 39) (Dkt'd 01/21/82).

Trial date set for 02/16/82 @ 9:30 AM (Counts 1, 3-5) (GOVT ORALLY MOVES FOR A CONT OF THE TRIAL FOR 30 DAYS. CRT GRNTS THE GOVT MOTN. THE TRIAL IS ORD CONTD. CRT FINDS THAT THE TIME FRM 10/28 TO 11/12 IS EXCLUDABLE UNDER THE SPEEDY TRIAL ACT DUE TO DISCV MOTNS. (NO CR 73 SUBMTD THIS TIME). THE GOVT IS INSTRUCTED TO PP A FORMAL ORD OF EXCLUDABLE TIME & THE CONT OF THE TRIAL DATE.) (JUDGE TASHIMA) (Doc: 39) (Dkt'd 01/21/82).

Status hearing set for 02/08/82 @ 10:00 AM (IF THE GOVT FILES A NOTC OF APPEAL PRIOR TO THAT DATE, THE STAT CONF WILL BE DEEMED OFF CAL.) (JUDGE TASHIMA) (Doc: 39) (Dkt'd 01/21/82).

- 01/22/82 Order filed (FLD ORDER RE: EXCLUSION OF TIME AND CONT OF TRIAL DATE) (JUDGE TASHIMA) (Doc: 40) (Dkt'd 02/01/82).
Excludable delay due to hearings on Pretrial Motions began on 10/28/81 and ended on 11/12/81 (JUDGE TASHIMA) (Doc: 41) (Dkt'd 02/01/82).
- 02/05/82 —FLD GOVT EX PARTE APPL FOR ORD SHORT TI, DECLAR. (Doc: 42) (Dkt'd 02/09/82).
Order filed (RE GOVT ORD SHRT TI, TO FLE MTN TO RECONSIDER.) (JUDGE TASHIMA) (Doc: 43) (Dkt'd 02/09/82).
Motion filed (MOT#8) (FLD GOVT NOTICE OF MTN & MTN TO RECONSIDER RULING SUPPRESSING EVIDENCE, MEMO OF P/A, EXHIBIT, RETRNB 2/8/82 @ 10AM.) (Doc: 44) (Dkt'd 02/09/82).
- 02/08/82 Status hearing held (RE GOVT MTN FOR RECONSID OF RULING SUPPRESS EVID. GOVT REQUEST ORD EXCLUD TI. CRT DIRECTS GOVT TO PREPARE A FORMAL ORD FOR EXCLUSION OF TI.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
Motion denied (MOT#8) (RE GOVT MTN FOR RECONSID.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
Order filed (CRT ORD TRIAL DATE VACATED AT TI NOTC OF APPEAL IS FILED.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- 02/09/82 Filed notice of interlocutory appeal (APPL#1) (FLD GOVT NOTC OF AP RE ORD GRANT IN PART MTNS TO SUPPRESS.) (Doc: 45) (Dkt'd 02/11/82).
Trial date stricken (Counts 1, 3-5) (RE ORD VACATING TRIAL DATE AT TI OF NOTC OF APPEAL.) (JUDGE TASHIMA) (Doc: 48) (Dkt'd 02/16/82).
- 02/12/82 Order filed (RE EXCLUSION OF TI.) (JUDGE TASHIMA) (Doc: 46) (Dkt'd 02/16/82).
Excludable delay due to hearings on Pretrial Motions began on 02/05/82 and ended on 02/08/82 (JUDGE TASHIMA) (Doc: 47) (Dkt'd 02/16/82).

- 02/18/82 Filed transcript of proceedings for 02/08/82 (Doc: 50)
 (Dkt'd 02/22/82).
- 02/22/82 —(APPL#1) (FLD NTC TO APPEAR BF A MAG.
 RETNB 3/3/82 @ 9:05AM BF MAG
 TASSOPULOS) (Doc: 51) (Dkt'd 02/23/82).
- 02/23/82 —(APPL#1) (FLD TRANSCRIPT DESIGNATION
 AND ORDG FORM) (Doc: 52) (Dkt'd 02/23/82).
- 03/12/82 Filed designation for record on appeal (LDGD USCA
 ORD FOR TIME SCHED ON GVT INTRLOC
 APPEAL) (Doc: 53) (Dkt'd 03/15/82).
- 04/06/82 —(APPL#1) (FLD ORIG RPTR'S TRNSCRIPT
 FOR PROC HAD ON 1-11-82, 1-12-82.) (Dkt'd
 04/13/82).

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JUNE 1981 GRAND JURY

CR 81-907

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ALBERTO ANTONIO LEON, ARMANDO LAZARO SANCHEZ,
PATSY ANN STEWART, RICARDO ALBERT DEL CASTILLO,
DEFENDANTS.

INDICTMENT

(21 U.S.C. - 846: Conspiracy to Distribute and Possess with
Intent to Distribute Narcotic Drug Controlled Substance; 21
U.S.C. §841(a)(1): Possession with Intent to Distribute Nar-
cotic Drug Controlled Substance)

The Grand Jury charges:

COUNT ONE
(21 U.S.C. §846)

Beginning on or about a date unknown to the Grand Jury and continuing until on or about September 21, 1981, within the Central District of California, defendants ALBERTO ANTONIO LEON, ARMANDO LAZARO SANCHEZ, PATSY ANN STEWART, and RICARDO ALBERT DEL CASTILLO combined, confederated and conspired together, to commit offenses against the United States in violation of Title 21, United States Code, Section 841(a)(1), namely:

1. Knowingly and intentionally to distribute cocaine, a schedule II narcotic drug controlled substance; and
2. Knowingly and intentionally to possess with intent to distribute cocaine.

It was part of the conspiracy that the defendants would maintain the condominium at 7902 Via Magdalena, Los Angeles, California, as a storage area for controlled substances that would be distributed by the defendants. De-

fendant RICARDO ALBERT DEL CASTILLO would at times reside at the condominium for security purposes. DEL CASTILLO would also transport cocaine from that location to the residence of defendants ARMANDO LAZARO SANCHEZ and PATSY ANN STEWART and the residence of defendant ALBERTO ANTONIO LEON. Thereafter, cocaine would be delivered or sold to prospective purchasers.

In order to effect the objects of the conspiracy, defendants ALBERTO ANTONIO LEON, ARMANDO LAZARO SANCHEZ, PATSY ANN STEWART, and RICARDO ALBERT DEL CASTILLO committed various overt acts within the Central District of California, and elsewhere, among which were the following:

1. On or about August 24, 1981, defendant RICARDO ALBERT DEL CASTILLO drove to 620 Price Drive, Burbank, California.

2. On or about August 28, 1981, defendant RICARDO ALBERT DEL CASTILLO drove to 7902 Via Magdalena, Los Angeles, California, and returned to 620 Price Drive, Burbank, California.

3. On or about August 28, 1981, in Los Angeles, California, defendant ARMANDO LAZARO SANCHEZ drove to 716 South Sunset Canyon, Burbank, California.

4. On or about September 11, 1981, defendants ARMANDO LAZARO SANCHEZ and PATSY ANN STEWART drove to Los Angeles International Airport.

5. On or about September 11, 1981, defendant ARMANDO LAZARO SANCHEZ traveled from Los Angeles, California to Miami, Florida.

6. On or about September 15, 1981, defendants PATSY ANN STEWART and RICARDO ALBERT DEL CASTILLO drove to Los Angeles International Airport.

7. On or about September 15, 1981, defendant PATSY ANN STEWART traveled from Los Angeles, California to Miami, Florida.

8. On or about September 19, 1981, defendants ARMANDO LAZARO SANCHEZ and PATSY ANN STEWART traveled together from Miami, Florida to Los Angeles, California.

9. On or about September 20, 1981, defendant RICARDO ALBERT DEL CASTILLO drove to 716 South Sunset Canyon, Burbank, California.

10. On or about September 21, 1981, defendants ALBERTO ANTONIO LEON, ARMANDO LAZARO SANCHEZ, PATSY ANN STEWART and RICARDO ALBERT DEL CASTILLO possessed quantities of cocaine.

COUNT TWO
(21 U.S.C. §841(a)(1))

On or about September 21, 1981, in Los Angeles County, within the Central District of California, defendant ALBERTO ANTONIO LEON knowingly and intentionally possessed with intent to distribute approximately 406.7 grams of cocaine, a schedule II narcotic drug controlled substance.

COUNT THREE
(21 U.S.C. §841(a)(1))

On or about September 21, 1981, in Los Angeles County, within the Central District of California, defendants ALBERTO ANTONIO LEON, ARMANDO LAZARO SANCHEZ, PATSY ANN STEWART, and RICARDO ALBERT DEL CASTILLO knowingly and intentionally possessed with intent to distribute approximately 1,888.4 grams of cocaine, a schedule II narcotic drug controlled substance.

COUNT FOUR
(21 U.S.C. §841(a)(1))

On or about September 21, 1981, in Los Angeles County, within the Central District of California, defendants ALBERTO ANTONIO LEON, ARMANDO LAZARO SANCHEZ, PATSY ANN STEWART, and RICARDO ALBERT DEL CASTILLO knowingly and intentionally possessed with intent to distribute approximately 1,165 tablets of Methaqualone, a schedule II controlled substance.

COUNT FIVE
(21 U.S.C. §841(a)(1))

On or about September 21, 1981, in Los Angeles county, within the Central District of California, defendants ARMANDO LAZARO SANCHEZ, PATSY ANN STEWART, and RICARDO ALBERT DEL CASTILLO knowingly and intention-

ally possessed with intent to distribute approximately 27.9 grams of cocaine, a schedule II narcotic drug controlled substance.

A TRUE BILL

Foreperson

ANDREA SHERIDAN ORDIN
United States Attorney

Search Warrant No. 5380

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

SEARCH WARRANT

PEOPLE OF THE STATE OF CALIFORNIA to any sheriff, policeman or peace officer in the County of Los Angeles: PROOF by affidavit having been made before me by C.A. ROMBACH that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it falls within those grounds indicated below by "x"(s) in that it:

- was stolen or embezzled
- ~~xx~~ was used as the means of committing a felony
- ~~xx~~ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery
- ~~xx~~ is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

you are therefore COMMANDED to SEARCH 620 Price Drive, City of Burbank, County of Los Angeles, State of California which is described as a one story single family dwelling, located on the South East corner of Price Drive and Jolley. The residence is constructed of stucco with wood and used brick trim. The stucco is painted a medium green and the wood trim is painted white. The residence [h]as a wainscoat of used brick across the front of the residence. The front door, which faces North, is of wood and glass construction. The upper half is diamond shaped windows and the lower half is solid wood. The door is painted white. Just to the right of the front door is a wooden plate, approximately 8" x 18", which is painted white, affixed to this plate are raised black metal numbers "620". Including all rooms, attics, basements, and other parts therein, the surrounding grounds and any garages, storage rooms, trash containers, and out-buildings of any kind located thereon.

Also to be searched is 716 South Sunset Canyon, City of Burbank, County of Los Angeles, State of California which

is described as a one story single family dwelling located on the North East corner of Sunset Canyon and Elmwood. The residence is constructed of wood and is painted beige with dark blue trim and shutters. It has a light brown composition shingle roof. The West and South side of the property, has a 3' cide block retaining wall with 18" x 3" pillars, on top every 8'. The retaining wall and each pillar is capped with red stone. The front door is solid wood and is painted the same dark blue as the trim. Including all rooms, attics, basements, and other parts therein, the surround grounds and any garages, storage rooms, trash containers, and out-buildings of any kind thereon.

Also to be searched is 7902 Via Magdalena, City of Los Angeles, County of Los Angeles, State of California; further described as one condominium unit in eight unit condominium building. 7902 Via Magdalena is of stucco construction off-white in color with brown wood trim. The metallic numbers 7902 are affixed to the upper right of the garage door. The garage door faces north and is brown in color. The numbers 7902 are affixed above the front door which faces south.

Also to be searched, the following vehicles:

(1) A 1980 Chevrolet Corvette, white in color, bearing California License number 019ZSZ which is registered to ARMANDO L. SANCHEZ 1145 Allen Ave., Glendale 91201. Vehicle is believed to be at or near 620 N. Price.

(2) A 1979 Pontiac, white in color, bearing California License number 620XIS which is registered to PATSY A. STEWART 620 Price Drive, Burbank, CA 91504. This vehicle is believed to be at or near 620 Price Drive.

(3) A 1979 Mercedes Benz, silver in color, bearing California License number 987WZA which is registered to ALBERT A. LEON, P.O. Box 5163, Glendale, CA 91201. Vehicle is believed to be at or near 716 South Sunset Canyon.

(4) A 1978 Pontiac, Maroon in color, bearing California License number 358TSU which is registered to RICK A. DEL CASTILLO. The vehicle is believed to be at or near 620 Price Drive, Burbank.

FOR THE FOLLOWING PROPERTY: Cocaine and Methaqualone, (commonly referred to as quaalude) and narcotics paraphernalia consisting in part of and including, but not limited to, scales and other weighing devices, balloons, condoms, paper bindles, measuring devices, and containers. Commonly associated with the storage and use of Cocaine and Methaqualone, and articles of personal property tending to establish and document sales of Cocaine and Methaqualone consisting in part of and including, but not limited to, U.S. Currency, buyer lists, seller lists and recollections of sales; and articles of personal property tending to establish the existence of a conspiracy to sell Cocaine and Methaqualone, consisting in part of and including, but not limited to, personal telephone books, address books, telephone bills, papers and documents containing lists of names; and articles of personal property tending to establish the identity of persons in control of premises vehicles, storage areas or containers being searched consisting in part of and including, but not limited to, utility company receipts, rent receipts, addressed envelopes, and keys.

* * * * *

and to SEIZE it if found and bring it forthwith before me, or this court, at the courthouse of this court.

Good cause having been shown by affidavit, you may do such of the following as bear my initials.

— You may serve this Warrant at anytime of the day or night, according to Penal Code Section 1533.

GIVEN under my hand and dated this 21 day of Sept. 1981.

/s/ Thomas C. Murphy
 THOMAS C. MURPHY
 Magistrate

Judge of the Superior Court

Search Warrant No.

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
AFFIDAVIT FOR SEARCH WARRANT

On the basis of his personal knowledge, as set forth in the attachments hereto, and on the basis of the information contained in these attachments, C.A. ROMBACH being duly sworn deposes and says, that the property described hereinafter falls within those grounds indicated below by "x"(s) in that it:

- _____ was stolen or embezzled
- ~~xx~~ was used as the means of committing a felony
- ~~xx~~ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing its discovery
- ~~xx~~ is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

and requests the issuance of a warrant to SEARCH 620 Price Drive, City of Burbank, County of Los Angeles, State of California which is described as a one story single family dwelling, located on the South East corner of Price Drive and Jolley. The residence is constructed of stucco with wood and used brick trim. The stucco is painted a medium green and the wood trim is painted white. The residence [h]as a wainscoat of used brick across the front of the residence. The front door, which faces North, is of wood and glass construction. The upper half is diamond shaped windows and the lower half is solid wood. The door is painted white. Just to the right of the front door is a wooden plate, approximately 8" x 18", which is painted white, affixed to this plate are raised black metal numbers "620". Including all rooms, attics, basements, and other parts therein, the surrounding grounds and any garages, storage rooms, trash containers, and outbuildings of any kind located thereon.

Also to be searched is 716 South Sunset Canyon City of Burbank, County of Los Angeles, State of California which

is described as a one story single family dwelling located on the North East corner of Sunset Canyon and Elmwood. The residence is constructed of wood and is painted beige with dark blue trim and shutters. It has a light brown composition shingle roof. The West and South side of the property, has a 3' cinder block retaining wall with 18" x 3' pillars, on top, every 8'. The retaining wall and each pillar is capped with red stone. The front door is solid wood and is painted the same dark blue as the trim. Including all rooms, attics, basements, and other parts therein, the surround grounds and any garages, storage rooms, trash containers, and out-buildings of any kind thereon.

Also to be searched is 7902 Via Magdalena, City of Los Angeles, County of Los Angeles, State of California; further described as one condominium unit in eight unit condominium building. 7902 Via Magdalena is of stucco construction off-white in color with brown wood trim. The metallic numbers 7902 are affixed to the upper left of the garage door. The garage door faces north and is brown in color. The numbers 7902 are affixed above the front door which faces south.

Also to be searched, the following vehicles:

(1) A 1980 Chevrolet Corvette, white in color, bearing California License number 019ZSZ which is registered to ARMANDO L. SANCHEZ 1145 Allen Ave., Glendale 91201. Vehicle is believed to be at or near 620 N. Price.

(2) A 1979 Pontiac, white in color, bearing California License number 620XIS which is registered to PATSY A. STEWART 620 Price Drive, Burbank, CA 91504. This vehicle is believed to be at or near 620 Price Drive.

(3) A 1979 Mercedes Benz, silver in color, bearing California License number 987WZA which is registered to ALBERT A. LEON, P.O. Box 5163, Glendale, CA 91201. Vehicle is believed to be at or near 716 South Sunset Canyon.

(4) A 1978 Pontiac, Maroon in color, bearing California License number 358TSU which is registered to RICK A. DEL CASTILLO. The vehicle is believed to be at or near 620 Price Drive, Burbank.

FOR THE FOLLOWING PROPERTY: Cocaine and Methaqualone, (commonly referred to as quaalude) and narcotics paraphernalia consisting in part of and including, but not limited to, scales and other weighing devices, balloons, condoms, paper bindles, measuring devices, and containers. Commonly associated with the storage and use of Cocaine and Methaqualone, and articles of personal property tending to establish and document sales of Cocaine and Methaqualone consisting in part of and including, but not limited to, U.S. Currency, buyer lists, seller lists and recordings of sales; and articles of personal property tending to establish the existence of a conspiracy to sell Cocaine and Methaqualone, consisting in part of and including, but not limited to, personal telephone books, address books, telephone bills, papers and documents containing lists of names; and articles of personal property tending to establish the identity of persons in control of premises vehicles, storage areas or containers being secured consisting in part of and including, but not limited to, utility company receipts, rent receipts, addressed envelopes, and keys.

* * * * *

The following attachments are incorporated by reference as though set forth herein *haec verba*:

Probable cause for search (see Attachment(s) No(s). ____)

Nighttime service request (see Attachment No. ____)

/s/ C. A. Rombach

Affiant

Subscribed and sworn to before me this 21 day of Sept., 1981.

/s/ Thomas C. Murphy

THOMAS C. MURPHY

Magistrate

Judge of the Superior Court

WHEREFORE, it is prayed that a Search Warrant be issued.

JOHN K. VAN DE KAMP

District Attorney

By

Deputy District Attorney

STATEMENT OF PROBABLE CAUSE

On August 18, 1981 your affiant was contacted by a confidential informant who stated that the male and female living at 620 Price Drive in Burbank were large scale dealers of the drugs Cocaine and Methaqualone (Quaalude). The informant stated the male subject known to him/her only as "ARMANDO" sold Cocaine in nothing smaller than one-half pound quantities, while the female known to him/her as "PATSY" sold Methaqualone tablets in quantities not smaller than one hundred at a time.

The informant told your affiant that "ARMANDO" was living at the 620 Price Drive address with "PATSY" who actually owned the house. The informant stated "ARMANDO" drove a newer model Chevrolet Corvette, white in color, while "PATSY" drove a late model Pontiac, white in color, with accident damage to the left front fender. The informant along with your affiant drove with your affiant to 620 Price Drive and stated this was the house in which "ARMANDO" and "PATSY" lived, and from which they carried on their drug sales. The informant told your affiant that he/she had been present in the house approximately five months ago and personally observed a sale of five hundred Methaqualone tablets take place between "PATSY" and another person. The informant stated he/she also observed between \$50,000.00 and \$100,000.00 in cash in a shoebox belonging to "PATSY" at the time of the aforementioned transaction. The informant stated "PATSY" and "ARMANDO" would normally only keep relatively small amounts of drugs in their house while the rest was kept at another location somewhere in the "hill area" of Burbank.

On August 19, 1981 your affiant drove by 620 Price and obtained the license numbers of a 1980 Chevrolet, white in color, California license number 019ZSZ and a 1979 Pontiac, white in color, California license number 620XIS. Both vehicles were parked on the street directly in front of 620 Price. The Pontiac had T/A damage to the left front fender.

Your affiant ascertained thru official Department of Motor Vehicles records that the Corvette is registered to

ARMANDO L. SANCHEZ, while the Pontiac is registered to PATSY A. STEWART.

DMV records show California drivers license number E094441 is issued to ARMANDO LAZARO SANCHEZ. SANCHEZ is described as a male 5' 11", 205 pounds, black hair, black eyes, date of birth 10-25-54. DMV records also show that California drivers license number M0982987 is issued to PATSY ANN STEWART, aka: PATSY ANN DAVILA. STEWART is described as female 5' 4", 125 pounds, blond hair, blue eyes, date of birth 10-21-40.

Your affiant could not locate a criminal record in California for either SANCHEZ or STEWART. Your affiant contacted the United States Drug Enforcement Administration and ascertained that ARMANDO LAZARO SANCHEZ, date of birth 10-25-54 was detected in possession of \$20,000.00 at Miami International Airport on 11-15-77. On 12-30-78 SANCHEZ and five other persons were arrested in Miami in possession of Marijuana. The Drug Enforcement Administration had no record on STEWART.

Your affiant along with other officers of the Burbank Police Department began conducting a surveillance of the Price Drive address on a time available basis.

On August 24, 1981 your affiant and Detective J. Bonar conducted a surveillance of 620 Price Drive beginning at about 1300 hours. Both the aforementioned Corvette and Pontiac were present. At approximately 1345 hours a 1978 Pontiac, maroon in color, California license number 358TSU arrived and parked in front of 620 Price Drive. A male Latin exited the vehicle and entered the Price Drive residence. At approximately 1355 hours the same male subject exited the residence carrying a small brown paper sack. The male subject walked to his vehicle where he opened the trunk and placed the paper sack inside. The male then entered the vehicle and drove away. Your affiant and Detective Bonar attempted to follow the vehicle but were unsuccessful.

Your affiant ascertained thru DMV records, that California license number 358TSU registers to RICARDO A. DELCASTILLO. DMV records indicate California drivers license number NO813379 is issued to RICARDO

ALBERTO DELCASTILLO. DELCASTILLO is described as a male, 5' 11", 160 pounds, brown hair, brown eyes, date of birth 11-27-52.

Your affiant ascertained thru official California Department of Justice Records that DELCASTILLO was on probation in California until March 1981 for a narcotic violation which occurred in Miami Florida on 1-30-79. Your affiant personally viewed DELCASTILLO'S probation file at the Hall of Records in Los Angeles, California. This probation file indicates that RICARDO DELCASTILLO, date of birth 11-27-52 was arrested by Narcotic Agents at Miami International Airport on 1-30-79 attempting to board an aircraft for Los Angeles. At the time of his arrest DELCASTILLO had fifty pounds of Marijuana in his luggage. The probation file indicates DELCASTILLO'S probation was transferred to California where it expired 3-19-81. Probation records show that DELCASTILLO was employed by Phoenix Enterprises Company, 320 Stocker, Glendale, California, phone 956-0548, while on probation.

Your affiant ascertained thru phone company records that phone number 956-0548 is listed to ALBERT LEON, 320 Stocker, Glendale.

Your affiant has personal knowledge that ALBERT A. LEON, male Latin, 6' 0", 210 pounds, black hair, brown eyes, date of birth 2-19-55, was arrested by officers of the Burbank Police Department on April 4, 1980. At the time of his arrest LEON was in the company of three other persons. All four were arrested for violation of 11350 H&S. A small amount of Cocaine and 279 Methaqualone tablets were seized during this investigation. At the time of arrest LEON furnished Burbank Police Department officers with the following information: residence, 320 E. Stocker #320, Glendale, home phone 956-0548, Business name and address, Phoenix Enterprise Company, 320 Stocker, phone 956-0548. The Los Angeles County District Attorney declined prosecution of LEON, however, one subject was charged and subsequently convicted.

At the time of LEON'S arrest a female by the name of KATHLEEN J. WOLSIC, date of date 1-28-55 was also arrested. Your affiant personally interviewed WOLSIC at

Burbank Police Department City Jail. WOLSIC told your affiant that she could not give any information concerning the persons involved as LEON was very heavily involved with the "Cuban Mafia" and the importation of drugs into this country. WOLSIC feared being killed if she cooperated with the police.

During the last week of July 1981 your affiant was contacted by Glendale Police Department Narcotic Officer Tim Spruill who advised that he had information from an informant that ALBERT LEON had several thousand Quaalude tablets in his residence on Stocker in Glendale. Spruill had noticed the Burbank Police Department arrest on LEON'S record and contacted your affiant to ascertain if any additional information was available.

During the last week of August 1981 your affiant ascertained from Glendale Police Department narcotics officers that their informant would not make a buy from LEON. Your affiant was told that LEON was now living at 716 S. Sunset Canyon in Burbank.

Your affiant ascertained thru Burbank Public Service Department records that the utilities at 716 S. Sunset are listed to ALBERT LEON. Your affiant also ascertained that phone number 843-5834 is listed to ALBERT LEON at 716 S. Sunset Canyon.

Your affiant personally viewed the Department of Justice arrest record on ALBERT LEON. This record indicates among other arrests that LEON was arrested by the Laguna Beach Police Department on 12-16-79 for violation of 11377(a) H&S. Sergeant David Newsham contacted Laguna Beach Police Department and ascertained that at the time of the aforementioned Laguna Beach arrest LEON was in possession of a small quantity of Quaalude tablets. Neither the DOJ record nor Laguna Beach PD shows whether or not LEON had been convicted.

ON August 25, 1981 your affiant and Detective J. Bonar set up a surveillance of 620 Price Drive at approximately 1330 hours. At about 1345 hours a 1955 Chevrolet pick-up truck, blue in color, bearing California license number H10747 arrived at the location. A male exited the vehicle and walked to the front door where he knocked. A few sec-

onds later the door was opened from within and the male entered. Approximately five minutes later the male exited the residence carrying a brown paper sack. The male was accompanied by a male latin matching the description of ARMANDO LAZARO SANCHEZ. The one male got into the aforementioned pick-up truck while the male later I.D.'d as SANCHEZ entered the white Corvette known to be owned by SANCHEZ. Both vehicles drove away in opposite directions. No attempt was made to follow either vehicle. At approximately 1425 hours the Corvette returned to 620 Price and the male later I.D.'d as SANCHEZ entered the residence.

Your affiant ascertained thru DMV records that the California license number H10747 is registered to a 1955 Chevrolet pick-up truck owned by THOMAS M. KILBURN. Your affiant ascertained that California drivers license number S0591793 is issued to THOMAS MICHAEL KILBURN. KILBURN is described as a male, 5' 11", 155 pounds, blond hair, blue eyes, date of birth 9-2-51.

Your affiant ascertained thru Department of Justice Records that THOMAS MICHAEL KILBURN date of birth 9-2-51 was arrested by the Glendale Police Department on May 28, 1974 for violation of 11357 H&S (Possession of Hashish) and 11358 H&S (Cultivation of Marijuana). DOJ records indicate a felony complaint was filed and KILBURN was placed on the Diversion program.

On August 26, 1981 at approximately 1500 hours your affiant and Detective J. Bonar again conducted a short surveillance of 620 Price Drive. At approximately 1600 hours a 1977 Datsun bearing California license 001SFF arrived at the location. A male latin exited the vehicle and walked to the front door of the residence. The male knocked and was admitted from within several seconds later. At approximately 1608 hours the male exited the residence carrying a brown box approximately one half the size of a shoe box. The male walked to his vehicle, placed the box in the trunk and then drove away. No attempt was made to follow the vehicle. Your affiant ascertained that the vehicle was ap-

parently a leased car and registered to Angeles Chevrolet in Los Angeles.

On August 27, 1981 at approximately 1500 hours your affiant and Detective J. Bonar again conducted a surveillance of the Price address. At approximately 1540 hours a silver 1977 Chevrolet bearing California license 374SRO arrived at the location. A male latin exited the vehicle and entered the residence after knocking. About twelve minutes later the male exited the residence and drove away.

On August 28, 1981 at 1900 hours your affiant along with other Burbank Police officers set up a surveillance of 620 Price Drive. At 2045 hours the vehicle owned by RICARDO DELCASTILLO (358TSU) arrived. A male latin exited the vehicle and entered 620 Price Drive. At 2050 hours the male latin exited the location, entered his vehicle, and drove to 7902 Via Magdalena in Villi Cabrini.

At 2100 hours a male latin later I.D.'d as ARMANDO SANCHEZ exited the residence, entered the white Corvette (019ZSZ—known to be owned by SANCHEZ), and drove to 716 S. Sunset Canyon in Burbank (residence owned by ALBERT LEON). The male exited the Corvette after parking in the driveway and went to the rear of the house, leaving his vehicle running. Approximately two minutes later the male returned to the vehicle and shut it off. He then re-entered the residence. Approximately twenty minutes later the male returned to his vehicle carrying a small package. The male entered his vehicle and drove directly back to 620 Price. During the time the male later I.D.'d as SANCHEZ was in the house a 1979 Mercedes Benz bearing California license 897WZA was parked on the street in front of the residence. Also during the time SANCHEZ was in the house, there were absolutely no interior lights visible from the street. The aforementioned observations at 716 S. Sunset Canyon were made by Burbank Police Department Sergeant David Newsham. Your affiant ascertained that the 1979 Mercedes (897WZA) registers to ALBERT LEON.

At 2140 hours a red vehicle bearing California license 1BSP762 arrived at 620 Price. A male exited the vehicle and entered the residence. Approximately thirty seconds

later the vehicle owned by DELCASTILLO (358TSU) returned to the residence. A male ran from the vehicle into the residence then almost immediately ran back to his vehicle and drove away.

At 2145 hours the male later I.D.'d as SANCHEZ exited 620 Price Drive, entered the Corvette and drove to the 3800 block of York Blvd. in Glassell Park where he exited the vehicle and entered an unknown residence.

At 2210 hours the male that had come to Price Drive in vehicle 1BSP762 left the residence and drove to 333 E. Providencia in Burbank.

At 2240 hours the male later I.D.'d as SANCHEZ came back to his vehicle on York Blvd. carrying a very large rectangular container. Sergeant Newsham observed the male place the container into the vehicle then drive away. At this point surveilling officers lost the vehicle. Officers immediately returned to the Price address. The surveillance was discontinued at 2350 hours after the Corvette did not return.

On September 8, 1981 at approximately 1900 hours Burbank Police Department Narcotic Officers were conducting another surveillance in a case thought to be unrelated to this investigation. This surveillance was being conducted at 1706 Landis in Burbank. The surveillance involved a suspected Amphetamine dealer and his girlfriend. At 1915 hours a white 1979 Pontiac bearing California license 620XIS (vehicle belonging to PATSY ANN STEWART—620 Price Drive) arrived at 1706 Landis. A female exited 1706 Landis and walked directly to the Pontiac where she entered. About one minute later the female exited the vehicle carrying a small brown paper sack and walked back into 1706 Landis. The vehicle then drove away. The aforementioned observation was made by Detective J. Bonar. The occupants of 1706 Landis were arrested later in the evening of September 8, 1981, after officers watched them drive to an Arleta address and apparently purchase a quantity of amphetamine. The amphetamine purchase in Arleta is not believed to be related to this investigation.

On September 11, 1981 your affiant and other officers set up a surveillance of 620 Price Drive. The surveillance was begun at 1915 hours. At this time the following vehicles were present at the location; 019ZSZ (white Corvette owned by SANCHEZ); 358TSU (vehicle owned by DELCASTILLO); and 1BSP762 (vehicle followed to 333 E. Providencia). At 1945 hours the Pontiac owned by STEWART (620XIS) arrived and a female later I.D.'d as PATSY STEWART entered the residence. At 2030 hours the vehicle owned by DELCASTILLO left the location. At 2045 hours the other vehicle (1BSP762) left and drove away. Officers followed this vehicle to 333 East Providencia.

At 2130 hours the male and female later I.D.'d as SANCHEZ and STEWART exited the residence and drove to Los Angeles International Airport where SANCHEZ exited the vehicle in front of the Eastern Airline Terminal. The Corvette drove away. SANCHEZ entered the terminal carrying only a small briefcase and folding type suit carrier. Your affiant watched while SANCHEZ boarded Eastern Airlines Flight #504 to Miami Florida. The aircraft departed the loading gate at approximately 2400 hours with SANCHEZ still aboard. Officers returned to Burbank Police Department where arrangements were made to ascertain when SANCHEZ returns from Miami. Your affiant recognized the subject that boarded the airplane as ARMANDO LAZARO SANCHEZ from a photo obtained from DMV.

On September 12, 1981, at 2200 hours, Detective J. Bonar set up a surveillance of 620 Price Dr. Upon Bonar's arrival at the location, a silver Honda CVCC, California License number 727LHI was parked on the street in front of the residence. The vehicle was occupied by a male Caucasian in his early twenties. A female later I.D.'d as PATSY STEWART was standing outside the vehicle speaking with the occupant. The female then entered the Honda and conversed with the male occupant for approximately five minutes. The female later I.D.'d as PATSY STEWART then exited the Honda car and walked to the white Corvette owned by SANCHEZ (019ZSZ). The female later I.D.'d as STEWART opened the passenger door of the Corvette,

reached in, and appeared to remove something. She then walked back to the Honda and entered. A conversation ensued for several minutes, then the female exited the vehicle and walked into 620 Price. The silver Honda drove away. The observations related above were made by Detective J. Bonar, who personally told your affiant of same.

On September 13, 1981, at 1830 hours, Burbank Police Department Sergeant David Newsham, conducted a short surveillance of 620 Price Drive in Burbank. Sergeant Newsham made the following observations which he personally related to your affiant. Upon his arrival at 620 Price, Sgt. Newsham observed the vehicle owned by RICARDO ALBERTO DEL CASTILLO (358TSU) to be parked on Jolly at the side of 620 Price. A male thought to be DEL CASTILLO was standing on the front porch of the residence speaking with an unknown male inside the open front door of the residence. A female later I.D.'d as PATSY STEWART was standing by the open passenger door of the white Corvette owned by SANCHEZ (019ZSZ). The female reached into the Corvette and appeared to remove a small package. The female then walked toward the residence. The male thought to be DEL CASTILLO walked from the front porch and met with the female later I.D.'d as PATSY STEWART. An exchange of some type took place between the male thought to be DEL CASTILLO and the female later I.D.'d as STEWART.

On September 15, 1981, at 1335 hours, Sergeant David Newsham and Detective Jim Bonar conducted a surveillance on 620 Price Drive. The following was personally related to your affiant by Sergeant Newsham:

Upon their arrival at the location, the Corvette owned by SANCHEZ was gone. The Pontiac owned by STEWART was present. At approximately 1350 hours, the vehicle owned by DEL CASTILLO (358TSU) arrived and a male thought to be DEL CASTILLO exited the vehicle and entered the residence. At 1415 hours, the male thought to be DEL CASTILLO exited the residence, put out the trash for City pick-up, then reentered the residence.

At 1545 hours, the aforementioned male exited the residence, walked to his vehicle (358TSU), opened the trunk,

closed the trunk, then walked back into the residence. As officers had never seen the Corvette gone for this length of time, Lieutenant Al Madrid of the Burbank Police Department contacted Eastern Airlines to ascertain if perhaps PATSY STEWART had made flight reservations. Lt. Madrid ascertained that "PATSY STEWART" had made reservations on "Eastern Airlines" Flight #504 to Miami. STEWART was to depart Los Angeles International Airport at 2330 hours, September 14, 1981. Surveillance was conducted until 1700 hours, then discontinued.

At 1930 hours, September 15, 1981, Burbank Police Department Detectives Rick Hoover, Frank Reilman, and Bill Allen set up a surveillance of 620 Price. Upon their arrival at the location the Corvette owned by SANCHEZ (019ZSZ) was present along with the Pontiac's owned by DEL CASTILLO and SANCHEZ. At 2055 hours a silver Honda CVCC (727LHI) arrived at the location and parked in front. An unknown female never seen before exited 620 Price and walked to the passenger side of the Honda. An exchange of some type took place between the occupant of the Honda and the unknown female. The unknown female then walked back into the residence and the Honda car drove away.

At 2210 hours, the female later I.D.'d as PATSY STEWART and the male thought to be RICARDO DEL CASTILLO entered the vehicle owned by DEL CASTILLO and drove to Los Angeles International Airport. The vehicle was followed by Detectives Hoover, Reilman, and Allen. The aforementioned observations were personally related to your affiant by Detectives Hoover and Reilman.

At 2310 hours, September 15, 1981, your affiant along with Sergeant Newsham and Detective Bonar were at the Eastern Airline Terminal at Los Angeles International Airport. Your affiant was notified by Detective Hoover that the vehicle owned by DEL CASTILLO was approaching the Eastern Airlines Terminal. Your affiant observed the vehicle owned by DEL CASTILLO pull to the curb in front of the Terminal. A female later I.D.'d as PATSY STEWART exited the vehicle carrying a camera case and a brown case measuring approximately 30" x 30" x 12". The

female later I.D.'d as STEWART did not check the brown case and walked directly to boarding gate 37B followed by your affiant, Sgt. Newsham, and Det. Bonar. While the female later I.D.'d as STEWART was standing in line waiting to board flight #504 she was smiling, laughing, and conversing with other passengers. Upon arriving at the boarding gate, the female was advised by a female boarding agent that she could not carry on a bag of that size. The boarding agent reached out to take the bag from the female later I.D.'d as STEWART. STEWART withdrew the bag and appeared very apprehensive about giving it to the boarding agent. After checking the bag into luggage, STEWART appeared very solemn and nervous. As she passed thru the boarding gate, the stewardess stated, "Thank you Miss STEWART, have a nice flight." The aforementioned observations were made by either your affiant or Detective Bonar or Sgt. Newsham. Those not directly observed by your affiant were personally related to your affiant by Newsham or Bonar.

On September 15, 1981, your affiant ascertained that the utilities at 620 Price Drive, Burbank, are listed in the name of PAT STEWART. Your affiant also ascertained that phone number 845-4158 lists to PAT STEWART at 620 Price Drive, Burbank.

Your affiant also ascertained thru Los Angeles City Department of Water and Power records that the utilities at 7902 Via Magdalena in Los Angeles are listed to PATSY A. STEWART and have been since August 10, 1979. DWP records indicate STEWART lists her home phone number as 845-4158 (this line goes into 620 Price as stated above). DWP records also indicate the driver's license number of the PATSY STEWART listed on the utilities at 7902 Via Magdalena is M098287. This is the same driver's license number of the PATSY STEWART at 620 Price. Your affiant ascertained thru official Pacific Telephone Company records that that there is NO phone line into 7902 Via Magdalena under any name.

It is your affiant's training and experience that large scale distributors of controlled substances most often keep large quantities of their product is [sic] a location other than their primary residence or place of business. This is

done to insure that should their illegal activities be detected by the police, and they be arrested, the police would seize only a relatively small amount of drugs and records. This location is commonly referred to as a "Stash Pad." It is your affiant's opinion that 7902 Via Magdalena is being utilized by the principals in this case as a "Stash Pad" and large quantities of controlled substances to wit; Cocaine and Methaqualone will be found there.

On September 18, 1981, Burbank Police Sergeant David Newsham contacted Eastern Airlines reservations and ascertained that both PATSY STEWART and A. SANCHEZ had reservations on Flight 504 from Miami to Los Angeles on September 19, 1981.

On September 19, 1981, Sergeant Newsham again contacted Eastern Airlines and ascertained that Flight 504 had departed Miami International Airport, and that both PATSY STEWART and A. SANCHEZ were aboard and were sitting together. Sergeant Newsham was told the subjects had checked at least one bag into luggage. Both of the aforementioned contacts with the airlines were personally related to your affiant by Sergeant Newsham.

On September 19, 1981, at 1630 hours, a surveillance was set up at 620 Price Drive by Sergeant Don Goldberg, and Detectives Frank Reilman and Bill Allen. Sergeant Newsham, along with Detectives Chris Thomas, Rick Hoover, and Jim Bonar, went to Los Angeles International Airport and met with the Airport Narcotics Detail.

At approximately 2045 hours, your affiant was advised by Detective Reilman that a silver vehicle, California License 374SRO had arrived at 620 Price. A male had exited the vehicle and entered the residence. There was no further activity at the Price Street location, and the surveillance was discontinued at 2210 hours.

At approximately 2115 hours, your affiant received a phone call from Sergeant David Newsham. Sergeant Newsham told your affiant that he had personally observed ARMANDO SANCHEZ and PATSY STEWART walk off of Eastern Airlines Flight 504 from Miami at 2030 hours. Sergeant Newsham told your affiant that STEWART and SANCHEZ walked off separately apart from each other. STEWART and SANCHEZ were carrying many pieces of

luggage, most of which they had not had in their possession when they had left Los Angeles. SANCHEZ and STEWART walked thru the terminal separately, then stopped and met at the top of the escalator. Both subjects then walked directly out of the terminal to the street where it appeared they were waiting for somebody to pick them up. Subjects waited approximately 20 minutes, during which time STEWART made two phone calls from inside the terminal. After making these phone calls, both subjects were about to enter a cab, when they were detained by LAX Narcotics Officers. The luggage of both subjects was searched with their consent. The only contraband found was a small amount of marijuana in a suitcase carried by STEWART. Both subjects were allowed to leave and departed the airport via taxi. neither STEWART nor SANCHEZ picked up any luggage at the airport other than what they carried off of the aircraft. Neither STEWART nor SANCHEZ was carrying the bag that STEWART had been carrying when she departed Los Angeles on September 15, 1981.

On September 19, 1981, at 0010 hours, your affiant and Detective Rick Hoover drove by 716 S. Sunset Canyon. The silver Chevrolet, with California License 374SRO, was parked out front of the Sunset Canyon address. This is the same vehicle that was at 620 Price at 2045 hours, 9/18/81. Your affiant observed a male exit 716 S. Sunset Canyon and enter this vehicle. Your affiant and Detective Hoover drove directly to 620 Price Drive. A short time later, the silver vehicle (374SRO) arrived. A male exited the vehicle and entered 620 Price. At the time the vehicle (374SRO) was at the Sunset Canyon address, a yellow Camero, California License number 290ZYA, was parked in the driveway of 716 S. Sunset Canyon.

Your affiant ascertained that California License number 374SRO registers to ARMANDO SANCHEZ. Your affiant also ascertained that California License number 290ZYA registers to ALBERT A. LEON/DINORAH JIMENEZ, P.O. Box 5163, Glendale.

Your affiant and Detective Hoover then drove to 7902 Via Magdalena and observed the interior lights of this loca-

tion to be on. This is the first time since the beginning of this investigation that your affiant has seen any sign of this location being occupied.

On September 21, 1981, your affiant and Detective Hoover conducted a surveillance of 716 S. Sunset Canyon. The yellow Camero (290ZYA) was present at the location. No activity was observed from 0615 hours thru 1130 hours. At 1200 hours, your affiant drove to 7902 Via Magdalena and observed the silver Chevrolet (374SRO) parked in a parking space adjacent to 7902 Via Magdalena.

Your affiant requests the identity of the informant in this case remain confidential as the informant is still an active informant and is continuing to provide information to your affiant. Disclosure of the informant's identity will eliminate his/her usefulness to law enforcement in future cases. Also, it has been your affiant's training/experience that informant's have been killed or seriously injured by the persons they have informed upon. Your affiant feels this will occur should the informant's identity be disclosed.

All observations made by officers other than your affiant and related above in the affidavit were personally told to your affiant by the officer making the observation.

* * * * *

OPINION OF AFFIANT

Your affiant, a peace officer employed by the Burbank Police Department, has received special training and experience in the field of Narcotics Investigation as follows: Seven and one half years as a Burbank Police Officer currently holding the rank of Detective. Your affiant worked as an undercover operator in a narcotics enforcement for eighteen months from January 1979 thru July 1980. Your affiant is currently assigned as a detective in the Vice/Narcotics Bureau.

Your affiant has completed courses having to do with narcotics identification, investigation, and enforcement at Los Angeles Valley College in Van Nuys, Rio Hondo College in Whittier, Pasadena Police Academy in Pasadena. In addition, your affiant has attended a 40 hours course in narcotics investigation at the California Department of Jus-

tice Bureau of Narcotic Enforcement Advanced Training Center in Sacramento, California. Your affiant has attended an 8 hour class at the Los Angeles Police Department Academy dealing with narcotic enforcement and Clandestine Laboratory Investigation. Your affiant has also attended an 8 hour school sponsored by the California Narcotics Officers Association dealing specifically with the drug Phencyclidine. Your affiant has received specialized narcotic training at various in-service training classes given at the Burbank Police Department. Your affiant has attended classes given by Dr. Donald Trockman, a court recognized expert in the field of Heroin addiction, given at the Burbank Police Department. Your affiant has attended a four hour lecture given by Doctor Trockman and Doctor Forrest Tennant Jr., at the Los Angeles Police Department Academy again dealing with Heroin addiction and the addict. In addition, your affiant has received personalized classroom instruction from Dr. Steven Lerner who is considered by many to be the nations foremost authority/expert on the drug Phencyclidine. All of the aforementioned doctors are court declared experts in their field and have testified as such.

Your affiant has also received personalized training from Burbank Police Department Sergeant Donald Goldberg who has testified as an expert in the field of narcotics investigation in both Municipal and Superior Court on more than four hundred occasions. In addition, your affiant has received personalized "On The Job" training from the following police officers employed by the Burbank Police Department: Investigators Vincent DeAmicis, Rick Hoover, Walt Lencki, Frank Reilman, Larry Koch, and officer Raymond Leyva. All of the aforementioned officers have testified as court declared narcotic experts. Your affiant has read numerous pieces of training materiel published by the Los Angeles Police Department, Los Angeles County Sheriff's Department, California Department of Justice, and the Federal Drug Enforcement Administration which specifically dealt with narcotics investigation.

Your affiant has personally instructed classes whose subject matter dealt with narcotics investigation. These classes

were taught to officers of the Burbank Police Department, and Los Angeles County Probation Department. In addition, your affiant has testified as an expert witness in narcotics cases in Municipal Court and Superior Court.

Your affiant has participated in arrests of persons for various narcotic violations on approximately 500 occasions. Approximately 300 of these have taken place in my present assignment.

Your affiant has discussed all aspects of this investigation with Sergeant David Newsham, Detective R. Hoover, and Detective F. Reilman, all of whom are court declared narcotic experts. Based on the facts contained in this affidavit your affiant has formed the opinion that ALBERT ANTONIO LEÓN date of birth 2-19-55, ARMANDO LAZARO SANCHEZ date of birth 10-25-54, PATSY ANN STEWART date of birth 10-21-40, and RICARDO ALBERTO DELCASTILLO date of birth 11-27-52, are co-conspirators in an on-going criminal enterprise involving the transportation and distribution of controlled substances and that evidence of this conspiracy will be found at or in the locations/vehicles to be searched pursuant to this search warrant.

ACQUISITION OF NON-DRUG PROPERTY AND REGULATORY SEIZURE

1. TYPE OF PROPERTY <input checked="" type="checkbox"/> MONEY <input type="checkbox"/> REGULATORY <input type="checkbox"/> FILM/FINGERPRINTS <input type="checkbox"/> OTHER <input type="checkbox"/> Recovered <input checked="" type="checkbox"/> Seized	3. FILE NO. R1-81-0265	4. G-DEP IDENTIFIER DA2-C2
	5. FILE TITLE LEON, Alberto Antonio et al.	
6. CUSTOMS REFERRAL <input type="checkbox"/> Case No. OR <input type="checkbox"/> Seizure No. No.	7. DATE PREPARED 9-23-81	8. PROGRAM CODE

Exhibit	10. NAME AND DESCRIPTION OF ARTICLES	11. COND. CODE	12. VALUE
A-A	\$11,500.00 United States Currency consisting of 113 \$100 Federal Reserve Notes, 162 \$50 F.R.N., 652 \$20 F.R.N., 106 \$10 F.R.N., 38 \$5 F.R.N., 4 \$1 F.R.N. one 25¢ piece, one nickel, 4 pennies.	N/A	XXX \$33,694.44
FISCAL CONTROL NUMBER: 35-122-81			

13. REMARKS Exhibit A-A Seized at 620 Priesen in Burbank, California pursuant to a State Search Warrant. Exhibit A-A Seized by Det. Frank Reilman, Burbank P.D. and maintained by him until 9-23-81 when he turned it over to S/A De Vorre. Exhibit A-A turned into L.A.D.O. Cashier on 9-23-81.

14. SUBMITTED BY (Signature & Title)
David L. De Vorre S/A

15. APPROVED BY (Signature & Title)
A. Dovetko G.S.

16. NO. PACKAGES 1		17. RECEIVED FROM (Signature & Date) David L. De Vorre 9/23/81		18. TITLE S/A	
19. SEAL Unbroken		20. RECEIVED BY (Signature & Date) David L. De Vorre 9-23-81		21. TITLE Custodian	

DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)					
22. Date DEA-48	23. Exhibit	24. Authorizing Name	25. Means of Disposition	26. Name	

27. REMARKS

28. ANALYST (Signature) _____ 29. DATE _____ 30. APPROVED BY (Signature) _____ 31. DATE _____

DEA Form 100-1000

Revised Edition 9-80

APPENDIX A

Page 1 - Prescription

ACQUISITION OF NON-DRUG PROPERTY AND REGULATORY SEIZURES

1. AGENCY PROPERTY EMPLOYMENT CUSTODY <input type="checkbox"/> Safekeeping <input type="checkbox"/> Transfer to Another Agency	2. TYPE OF PROPERTY <input type="checkbox"/> MONEY <input type="checkbox"/> Recovered <input type="checkbox"/> Seized	<input type="checkbox"/> REGULATORY <input type="checkbox"/> FILM/FINGERPRINTS <input checked="" type="checkbox"/> OTHER	3. FILE NO. R1-51-2265	4. G-DEP IDENTIFIER DA2-C2
	5. CUSTOMS REFERRAL <input type="checkbox"/> Case No. OR <input type="checkbox"/> Seizure No.		6. FILE TITLE LEON, Alberto Antonio et al. -	
			7. DATE PREPARED 10-14-81	8. PROGRAM CODE

9. Exhibit	10. NAME AND DESCRIPTION OF ARTICLES	11. COND. CODE	12. VALUE
A-J	Plastic bag with miscellaneous photos, SANCHEZ' drivers license and Alien Registration card, Safety Deposit box receipt and purchase receipts for LEON'S weapon and SANCHEZ' weapons.	S	N/A
A-H	Miscellaneous letters addressed to SANCHEZ and LEON at 620 Price; check book, address book.	S	N/A
A-I	Black checkbook in name of Armando SANCHEZ at 620 Price.	S	N/A
A-J	Brown wallet with miscellaneous receipts for jewelry.	S	N/A

13. REMARKS Exhibits A-J, A-H, A-I & A-J were seized at 620 Price in Burbank, California pursuant to a State Search Warrant #S-350. Exhibits seized by Det. Frank Reilman, Burbank P.D. and maintained by him until 9-29-81 when he turned them over to S/A De Vorre. Exhibits maintained in L.A.D.O. Evidence Vault until 10-14-81 when S/A De Vorre removed and processed them.

14. SUBMITTED BY SPECIAL AGENT/INVESTIGATOR (Signature)
David L. De Vorre

15. APPROVED BY (Signature)
Bobby L. Sheppard

16. NO. PACKAGES 4		17. RECEIVED FROM (Signature & Date) David L. De Vorre 10/15/81		18. TITLE S/A	
19. SEAL Unbroken		20. RECEIVED BY (Signature & Date) James De Vore 10-15-81		21. TITLE Att. Custodian	

DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)					
22. Dew DEA-48	23. Exhibit	24. Authorizing Name	25. Means of Disposition	26.	27. Name

27. REMARKS

28. ANALYST (Signature) 29. DATE 30. APPROVED BY (Signature) 31. DATE

10-1 Form

ACQUISITION OF NON-DRUG PROPERTY AND REGULATORY SEIZURES

1. SEIZURE DATE FORWARD CUSTODY <input type="checkbox"/> Seizure <input type="checkbox"/> Transfer to Another Agency	2. TYPE OF PROPERTY <input type="checkbox"/> MONEY <input type="checkbox"/> Recovered <input type="checkbox"/> Seized	<input type="checkbox"/> REGULATORY <input type="checkbox"/> FILM/FINGERPRINTS <input type="checkbox"/> OTHER	3. FILE NO. R7-51-0265	4. G-DEP IDENTIFIER DA2-52
	5. CUSTOMS REFERRAL <input type="checkbox"/> Case No. OR <input type="checkbox"/> Seizure No. No.		6. FILE TITLE LEON, Alberto Antonio et al.	7. DATE PREPARED 10-14-81
			8. PROGRAM CODE	

Exhibit	10. NAME AND DESCRIPTION OF ARTICLES	11. COND. CODE	12. VALUE
A-K	Miscellaneous letters for LEON addressed to SANCHEZ at 620 Price, Carpet installation papers, photograph, 3 payroll checks to SANCHEZ and U.S. District Court documents for SANCHEZ.	S	N/A
A-L	Purchase papers for Miami Condominium for LEON, SANCHEZ and STEWART.	S	N/A
A-M	Miscellaneous papers and documents including cancelled checks, spiral notebooks, address book and tax bills, Airline ticket stub and newspaper articles.	S	N/A
A-N	Brown Bates telephone index.	S	N/A
A-O	Black telephone index.	S	N/A

13. REMARKS Exhibits A-K, A-L, A-M, A-N & A-O were seized at 620 Price in Burbank, California pursuant to a State Search Warrant #S-380. Exhibits seized by Det. Frank Reilman, Burbank P.D. and maintained by him until 9-29-81 when he turned them over to S/A De Vorre. Exhibits maintained in L.A.D.O. Evidence Vault until 10-14-81 when S/A De Vorre removed and processed them.

14. SUBMITTED BY SPECIAL AGENT/INVESTIGATOR (Signature)
David L. De Vorre

15. APPROVED BY (Signature)
Robert J. Sheppard

RECEIPT REPORT

16. NO. PACKAGES
5

17. RECEIVED FROM (Signature & Date)
David L. De Vorre 10/15/81

18. SEAL
Broken
Unbroken

19. RECEIVED BY (Signature & Date)
James De Vorre 10-15-81

20. TITLE
S/A

21. TITLE
Rt. Antonio

DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)

22. Date DEA-48	23. Exhibit	24. Authorizing Name	25. Means of Disposition	26. Name

27. REMARKS


28. ANALYST (Signature)

29. DATE

30. APPROVED BY (Signature)

31. DATE

ACQUISITION OF NON-DRUG PROPERTY AND REGULATORY SEIZURE.

1. DUE  CE LITURE ORARY CUSTODY <input type="checkbox"/> Seizure <input type="checkbox"/> Transfer to Another Agency	2. TYPE OF PROPERTY <input type="checkbox"/> MONEY <input type="checkbox"/> REGULATORY <input type="checkbox"/> Recovered <input type="checkbox"/> FILM/FINGERPRINTS <input type="checkbox"/> Seized <input checked="" type="checkbox"/> OTHER	3. FILE NO. R7-81-2265	4. G-DEF IDENTIFIER DA2-C2
	5. CUSTOMS REFERRAL <input type="checkbox"/> Case No. <input type="checkbox"/> Seizure No. No.	6. FILE TITLE LEON, Alberto Antonio et al.	7. DATE PREPARED 10-14-81

[illegible]

12. REMARKS Exhibits A-P, A-Q, A-R, A-S & A-T were seized at 620 Price in Burbank, California pursuant to a State Search Warrant #S-380. Exhibits seized by Det. Frank Reilman, Burbank P.D. and maintained by him until 9-29-51 when he turned them over to S/A De Vorre. Exhibits maintained in L.A.D.O. Evidence Vault until 10-14-51 when S/A De Vorre removed and processed them.

14. SUBMITTED BY SPECIAL AGENT/INVESTIGATOR Signature David L. De Vorre	15. APPROVED BY (Signature) Bobby M. Sheppard
RECEIPT REPORT	

16. NO. PACKAGES 5	17. RECEIVED FROM (Signature & Date) Nelson - 10/15/81	18. TITLE S/A
19. SEAL <input checked="" type="checkbox"/> Broken <input type="checkbox"/> Unbroken	20. RECEIVED BY (Signature & Date) JMW 10-15-81	21. TITLE Att. Controller
DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)		

[illegible]

27. REMARKS

28. ANALYST (Signature)	29. DATE	30. APPROVED BY (Signature)	31. DATE
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ACQUISITION OF NON-DRUG PROPERTY AND REGULATORY SEIZURES

1. BUREAU FBI		2. TYPE OF PROPERTY <input type="checkbox"/> MONEY <input type="checkbox"/> REGULATORY <input type="checkbox"/> Recovered <input type="checkbox"/> FILM/FINGERPRINTS <input type="checkbox"/> Seized <input checked="" type="checkbox"/> OTHER		3. FILE NO. R1-51-0265	4. G-DEP IDENTIFIER DA2-72
5. PROPERTY CUSTODY <input type="checkbox"/> Safekeeping <input type="checkbox"/> Transfer to Another Agency		6. CUSTOMS REFERRAL <input type="checkbox"/> Case No. OR <input type="checkbox"/> Seizure No.		8. FILE TITLE LPCN, Alberto Antonio et al.	
				7. DATE PREPARED 10-14-81	9. PROGRAM CODE
10. NAME AND DESCRIPTION OF ARTICLES	11. COND. CODE	12. VALUE			
A-U Photographs.	S	N/A			
A-V Brown paper "LUCKY" shipping bag.	S	N/A			
A-W Brown paper bag, mens trunks, photographs, address books and Safety Deposit box rental forms.	S	N/A			
A-X Miscellaneous cocaine paraphernalia.	S	N/A			
A-Y Cocaine mirror.	S	N/A			

13. REMARKS Exhibits A-U, A-V, A-W, A-X and A-Y were seized at 620 Price Burbank, California pursuant to a State Search Warrant #S-380. Exhibits seized by Det. Frank Railman, Burbank P.D. and maintained by him until 9-29-81 when he turned them over to S/A De Vorre. Exhibits maintained in L.A.D.O. Evidence Vault until 10-14-81 when S/A De Vorre removed and processed them.

14. SUBMITTED BY SPECIAL AGENT/INVESTIGATOR (Signature) David L. De Vorre		15. APPROVED BY (Signature) [Signature]	
RECEIPT REPORT			
16. NO. PACKAGES 5	17. RECEIVED FROM (Signature & Date) [Signature] 10/15/81	18. TITLE S/A	
19. SEAL Broken Unbroken	20. RECEIVED BY (Signature & Date) [Signature] 10-15-81	21. TITLE Alt. Custodian	
DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)			
22. Date DEA-48	23. Exhibit	24. Authorizing Name	25. Means of Disposition
27. REMARKS			

28. ANALYST (Signature)	29. DATE	30. APPROVED BY (Signature)	31. DATE

DEA Form - 78
Chap. 10000

Previous Editions are Obsolete.

Copy 1 - Retention

ACQUISITION OF NON-DRUG PROPERTY AND REGULATORY SEIZURES

1. SEIZURE NCE SEIZURE UPONARY CUSTODY <input type="checkbox"/> Seizure <input type="checkbox"/> Transfer to Another Agency		2. TYPE OF PROPERTY <input checked="" type="checkbox"/> MONEY <input type="checkbox"/> REGULATORY <input type="checkbox"/> FILM/FINGERPRINTS <input type="checkbox"/> OTHER 3. CUSTOMS REFERRAL <input type="checkbox"/> Case No. OR <input type="checkbox"/> Seizure No.		3. FILE NO. R1-21-0265		4. G-DEP IDENTIFIER DA2-C2	
				5. FILE TITLE LEON, Alberto Antonio		7. DATE PREPARED 9-23-81	
				8. PROGRAM CODE			
Exhibit	10. NAME AND DESCRIPTION OF ARTICLES						11. COND. CODE
B-A	\$6,739 United States Currency consisting of 15 \$100 Federal Reserve Notes, 33 \$50 F.R.N., 178 \$20 F.R.N., 2 \$10 F.R.N. and 9 \$1 F.R.N.						N/A
							12. VALUE \$6,739.00
FISCAL CONTROL NUMBER 35-423-81							

13. REMARKS Exhibit B-A Seized at 716 So. Sunset Cyn, Burbank, California pursuant to a State Search Warrant. Exhibit B-A Seized by Det. Rick Hoover, Burbank P.D. and maintained by him until 9-23-81 when he turned it over to S/A De Vorre. Exhibit B-A turned into L.A.D.O. Cashier on 9-23-81.

14. SUBMITTED BY (Signature) David L. De Vorre S/A		15. APPROVED BY (Signature & Title) Al Doretka G.S.	
RECEIPT REPORT			
16. NO. PACKAGES 1	17. RECEIVED FROM (Signature & Date) H. J. T. 9-23-81	18. TITLE S/A	
19. SEAL <input type="checkbox"/> Broken	20. RECEIVED BY (Signature & Date) David L. De Vorre 9-23-81	21. TITLE Custodian	
DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)			
22. Date DEA-48	23. Exhibit	24. Authorizing Name	25. Name
27. REMARKS			

APPENDIX A

28. ANALYST (Signature)	29. DATE	30. APPROVED BY (Signature)	31. DATE
-------------------------	----------	-----------------------------	----------

Previous Editions are Obsolete.

Copy 1 - Production

1. SA VCE SITING FORARY CUSTODY <input type="checkbox"/> Subrogating <input type="checkbox"/> Transfer to Another Agency	2. TYPE OF PROPERTY <input type="checkbox"/> MONEY <input type="checkbox"/> Real Estate <input type="checkbox"/> Stock <input type="checkbox"/> REGULATORY <input type="checkbox"/> FILM/FINGERPRINTS <input type="checkbox"/> OTHER	3. FILE NO. R1-81-0265	4. C-REP IDENTIFIER DA2-C2
5. CUSTOMER REFERRAL <input type="checkbox"/> Case No. OR <input type="checkbox"/> Source No. No.		5. FILE TITLE LEON, Alberto Antonio et al.	
		7. DATE PREPARED 9-30-81	8. PROGRAM CODE ..

59

Exhibit #B-E seized from 716 South Sunset Canyon, Burbank, California pursuant to a State Search Warrant #S-380. Exhibit #B-E seized by Det. Rick Hoover, Burbank P.D. and maintained by him until 9/23/81 when he turned it over to S/A's De Vorre and Dromgoole. Exhibit #B-E maintained by S/A Dromgoole until 9/30/81 when he turned it into the L.A. P.D., Evidence Custodian.

1. NO. PACKAGES		2. RECEIVED BY (Signature & Date)		3. TITLE	
1		Michael D. [Signature] 9/30/81		S/A	
4. SEAL		5. RECEIVED BY (Signature & Date)		6. TITLE	
<input checked="" type="checkbox"/> Broken <input type="checkbox"/> Unbroken		James D. [Signature] 9/30/81		Alt. Custodian	
DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)					

[illegible]

20. ANALYST (Signature)	21. DATE	22. APPROVED BY (Signature)	23. DATE
-------------------------	----------	-----------------------------	----------

1. ORIGIN (C) INTERNAL SECURITY (S) STATE (F) FEDERAL (A) ARMY (N) NAVY (A) AIR FORCE (M) MARINE CORPS (C) COAST GUARD (S) SECRET SERVICE (O) OTHER	2. TYPE OF PROPERTY <input type="checkbox"/> MONEY <input type="checkbox"/> RECEIVED <input type="checkbox"/> STOLEN <input type="checkbox"/> REGULATORY <input type="checkbox"/> FILM/FINGERPRINTS <input checked="" type="checkbox"/> OTHER	3. FILE NO. H1-21-0265	4. G-SEP IDENTIFIER DA2-C2
	5. CUSTOMS REFERRAL <input type="checkbox"/> Case No. OR <input type="checkbox"/> Shipment No. No.	6. FILE TITLE LEW, Alberto Antonio et al.	7. DATE PREPARED 10-1-81

[illegible]

30

14. SUBMITTED BY SPECIAL AGENT/INVESTIGATOR (Signature)
David L. De Vorre *[Signature]*

15. APPROVED BY (Signature & Title)
Bobby *[Signature]* Steward

RECEIPT REPORT

19. NO. PACKAGES 5	17. RECEIVED FROM (Signature & Date) L. J. [Signature] 10/15/81	18. TITLE 5/B
20. SEAL Unbroken	20. RECEIVED BY (Signature & Date) L. J. [Signature] 10-15-81	21. TYPED Custodian
DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)		

23. Date DEA-48	22. Exhibit	24. Authorizing Name	25. Means of Classification	26. Name

27. REMARKS

20. ANALYST (Signature)	21. DATE	22. APPROVED BY (Signature)	23. DATE
-------------------------	----------	-----------------------------	----------

ACQUISITION OF NON-DRUG PROPERTY AND REGULATORY SEIZURE

1. OFFICE SITURE PROPERTY CUSTODY <input type="checkbox"/> Seizure <input type="checkbox"/> Transfer to Another Agency	2. TYPE OF PROPERTY <input type="checkbox"/> MONEY <input type="checkbox"/> Recovered <input type="checkbox"/> Seized	<input type="checkbox"/> REGULATORY <input type="checkbox"/> FILM/FINGERPRINTS <input type="checkbox"/> OTHER	3. FILE NO. R1-S1-0265	4. G-DEP IDENTIFIER DA2-C2
	5. CUSTOMS REFERRAL <input type="checkbox"/> Case No. OR <input type="checkbox"/> Seizure No.		5. FILE TITLE LEON, Alberto Antonio et al.	
			7. DATE PREPARED 10-14-81	8. PROGRAM CODE
10. NAME AND DESCRIPTION OF ARTICLES			11. COND. CODE	12. VALUE
B-1 Set of 2 keys.			S	N/A
B-2 Address book, (No cover).			S	N/A
B-3 One box containing cocaine cutting and testing paraphernalia.			S	N/A
B-4 One Ohaus Cent-O-Gram, 311 gram scale, (removed from exhibit B-3 for storage).			S	N/A
B-5 Miscellaneous papers and documents.			S	N/A

13. REMARKS Exhibits B-1, B-2, B-3, B-4 & B-5 were seized at 716 So. Sunset Canyon in Burbank, California pursuant to a State Search Warrant #S-380. Exhibits seized by Det. Rick Hoover, Burbank P.D. and maintained by him until 9-29-81 when he turned them over to S/A De Vorre. Exhibits maintained in the L.A.D.O. Evidence Vault until 10-14-81 when S/A De Vorre removed and processed them.

14. SUBMITTED BY SPECIAL AGENT/INVESTIGATOR (Signature) David L. De Vorre		15. APPROVED BY (Signature) Bobby R. Sheppard	
RECEIPT REPORT			
16. NO. PACKAGES 5	17. RECEIVED FROM (Signature & Date) David L. De Vorre 10/15/81	18. TITLE S/A	
19. SEAL Broken Unbroken	20. RECEIVED BY (Signature & Date) James De Vorre 10-15-81	21. TITLE Det. Custodian	
DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)			
22. Date DEA-48	23. Exhibit	24. Authorizing Name	25. Means of Disposition
27. REMARKS			

28. ANALYST (Signature)

29. DATE

30. APPROVED BY (Signature)

31. DATE

ACQUISITION OF NON-DRUG PROPERTY AND REGULATORY SEIZURES

1. NATURE OF PROPERTY <input type="checkbox"/> EVIDENCE <input type="checkbox"/> TEMPORARY CUSTODY <input type="checkbox"/> Safekeeping <input type="checkbox"/> Transfer to Another Agency		2. TYPE OF PROPERTY <input type="checkbox"/> MONEY <input type="checkbox"/> Recovered <input type="checkbox"/> Seized <input type="checkbox"/> REGULATORY <input type="checkbox"/> FILM/FINGERPRINTS <input checked="" type="checkbox"/> OTHER		3. FILE NO. E1-91-2265		4. G-SEP IDENTIFIER DA2-C2	
		5. CUSTOMS REFERRAL <input type="checkbox"/> Case No. OR <input type="checkbox"/> Seizure No. No.		5. FILE TITLE LECT, Alberto Antonio et al.		7. DATE PREPARED 10-15-81	
				8. PROGRAM CODE --			
10. NAME AND DESCRIPTION OF ARTICLES						11. COND. CODE	12. VALUE
(C-B) Large "U-Haul" cardboard box containing "LUCKY" Shopping bags with red letters. THIS EXHIBIT WILL BE USED TO STORE THE FOLLOWING EXHIBITS: C-C, C-D, C-E, C-F, C-G, C-H, C-I, C-J, C-K, C-L, C-M, C-N, C-O, C-P, C-Q, C-R, C-S, C-T, C-U, C-V, C-W, C-X, C-Y, C-Z, C-AA, C-AB, C-AC, C-AD, C-AE, C-AF, C-AG, C-AH, C-AI, C-AJ, C-AL, C-AM, C-AN, C-AO, C-AP, C-AQ, C-AR, C-AS, C-AT, C-AU, C-AV, C-AW, C-AX, C-AY, C-AZ, C-BA, C-BB, C-BC, C-BD, C-BE, C-BF, C-BG, C-BH, C-BI, C-BJ, C-BK, C-BL, C-BM, C-BN, C-BO, C-BP, C-BQ, C-BR, C-BS, C-BT, C-BU, C-BV, C-BW, C-BX, C-BY, C-BZ, C-CA, C-CB, C-CC, C-CD, C-CE, C-CF, C-CG, C-CH, C-CI, C-CJ, C-CK, C-CL, C-CM, C-CN, C-CO, C-CP, C-CQ, C-CR, C-CS, C-CT, C-CU, C-CV, C-CW, C-CX, C-CY, C-CZ, C-DA, C-DB, C-DC, C-DD, C-DE, C-DF, C-DG, C-DH, C-DI, C-DJ, C-DK, C-DM, C-DN, C-DO, C-DP, C-DQ, C-DR, C-DS, C-DT, C-DU, C-DV, C-DW, C-DX, C-DY, C-DZ, C-EA, C-EB, C-EC, C-ED, C-EE, C-EF, C-EG, C-EH, C-EI, C-EJ, C-EK, C-EL, C-EM, C-EN, C-EO, C-EP, C-EQ, C-ER, C-ES, C-ET, C-EU, C-EV, C-EW, C-EX, C-EY, C-EZ, C-FA, C-FB, C-FC, C-FD, C-FE, C-FF, C-FG, C-FH, C-FI, C-FJ, C-FK, C-FL, C-FM, C-FN, C-FO, C-FP, C-FQ, C-FR, C-FS, C-FT, C-FU, C-FV, C-FW, C-FX, C-FY, C-FZ, C-GA, C-GB, C-GC, C-GD, C-GE, C-GF, C-GG, C-GH, C-GI, C-GJ, C-GK, C-GL, C-GM, C-GN, C-GO, C-GP, C-GQ, C-GR, C-GS, C-GT, C-GU, C-GV, C-GW, C-GX, C-GY, C-GZ, C-HA, C-HB, C-HC, C-HD, C-HE, C-HF, C-HG, C-HI, C-HJ, C-HK, C-HL, C-HM, C-HN, C-HO, C-HP, C-HQ, C-HR, C-HS, C-HT, C-HU, C-HV, C-HW, C-HX, C-HY, C-HZ, C-IA, C-IB, C-IC, C-ID, C-IE, C-IF, C-IG, C-IH, C-II, C-IJ, C-IK, C-IL, C-IM, C-IN, C-IO, C-IP, C-IQ, C-IR, C-IS, C-IT, C-IU, C-IV, C-IW, C-IX, C-IY, C-IZ, C-JA, C-JB, C-JC, C-JD, C-JE, C-JF, C-JG, C-JH, C-JI, C-JJ, C-JK, C-JL, C-JM, C-JN, C-JO, C-JP, C-JQ, C-JR, C-JS, C-JT, C-JU, C-JV, C-JW, C-JX, C-JY, C-JZ, C-KA, C-KB, C-KC, C-KD, C-KE, C-KF, C-KG, C-KH, C-KI, C-KJ, C-KK, C-KL, C-KM, C-KN, C-KO, C-KP, C-KQ, C-KR, C-KS, C-KT, C-KU, C-KV, C-KW, C-KX, C-KY, C-KZ, C-LA, C-LB, C-LC, C-LD, C-LE, C-LF, C-LG, C-LH, C-LI, C-LJ, C-LK, C-LL, C-LM, C-LN, C-LO, C-LP, C-LQ, C-LR, C-LS, C-LT, C-LU, C-LV, C-LW, C-LX, C-LY, C-LZ, C-MA, C-MB, C-MC, C-MD, C-ME, C-MF, C-MG, C-MH, C-MI, C-MJ, C-MK, C-ML, C-MM, C-MN, C-MO, C-MP, C-MQ, C-MR, C-MS, C-MT, C-MU, C-MV, C-MW, C-MX, C-MY, C-MZ, C-NA, C-NB, C-NC, C-ND, C-NE, C-NF, C-NG, C-NH, C-NI, C-NJ, C-NK, C-NL, C-NM, C-NN, C-NO, C-NP, C-NQ, C-NR, C-NS, C-NT, C-NU, C-NV, C-NW, C-NX, C-NY, C-NZ, C-OA, C-OB, C-OC, C-OD, C-OE, C-OF, C-OG, C-OH, C-OI, C-OJ, C-OK, C-OL, C-OM, C-ON, C-OO, C-OP, C-OQ, C-OR, C-OS, C-OT, C-OU, C-OV, C-OW, C-OX, C-OY, C-OZ, C-PA, C-PB, C-PC, C-PD, C-PE, C-PF, C-PG, C-PH, C-PI, C-PJ, C-PK, C-PL, C-PM, C-PN, C-PO, C-PP, C-PQ, C-PR, C-PS, C-PT, C-PU, C-PV, C-PW, C-PX, C-PY, C-PZ, C-QA, C-QB, C-QC, C-QD, C-QE, C-QF, C-QG, C-QH, C-QI, C-QJ, C-QK, C-QL, C-QM, C-QN, C-QO, C-QP, C-QQ, C-QR, C-QS, C-QT, C-QU, C-QV, C-QW, C-QX, C-QY, C-QZ, C-RA, C-RB, C-RC, C-RD, C-RE, C-RF, C-RG, C-RH, C-RI, C-RJ, C-RK, C-RL, C-RM, C-RN, C-RO, C-RP, C-RQ, C-RR, C-RS, C-RT, C-RU, C-RV, C-RW, C-RX, C-RY, C-RZ, C-SA, C-SB, C-SC, C-SD, C-SE, C-SF, C-SG, C-SH, C-SI, C-SJ, C-SK, C-SL, C-SM, C-SN, C-SO, C-SP, C-SQ, C-SR, C-SS, C-ST, C-SU, C-SV, C-SW, C-SX, C-SY, C-SZ, C-TA, C-TB, C-TC, C-TD, C-TE, C-TF, C-TG, C-TH, C-TI, C-TJ, C-TK, C-TL, C-TM, C-TN, C-TO, C-TP, C-TQ, C-TR, C-TS, C-TT, C-TU, C-TV, C-TW, C-TX, C-TY, C-TZ, C-UA, C-UB, C-UC, C-UD, C-UE, C-UF, C-UG, C-UH, C-UI, C-UJ, C-UK, C-UL, C-UM, C-UN, C-UO, C-UP, C-UQ, C-UR, C-US, C-UT, C-UY, C-UZ, C-VA, C-VB, C-VC, C-VD, C-VE, C-VF, C-VG, C-VH, C-VI, C-VJ, C-VK, C-VL, C-VM, C-VN, C-VO, C-VP, C-VQ, C-VR, C-VS, C-VT, C-VU, C-VV, C-VW, C-VX, C-VY, C-VZ, C-WA, C-WB, C-WC, C-WD, C-WE, C-WF, C-WG, C-WH, C-WI, C-WJ, C-WK, C-WL, C-WM, C-WN, C-WO, C-WP, C-WQ, C-WR, C-WS, C-WT, C-WU, C-WV, C-WX, C-WY, C-WZ, C-XA, C-XB, C-XC, C-XD, C-XE, C-XF, C-XG, C-XH, C-XI, C-XJ, C-XK, C-XL, C-XM, C-XN, C-XO, C-XP, C-XQ, C-XR, C-XS, C-XT, C-XU, C-XV, C-XW, C-XX, C-XY, C-XZ, C-YA, C-YB, C-YC, C-YD, C-YE, C-YF, C-YG, C-YH, C-YI, C-YJ, C-YK, C-YL, C-YM, C-YN, C-YO, C-YP, C-YQ, C-YR, C-YS, C-YT, C-YU, C-YV, C-YW, C-YX, C-YZ, C-ZA, C-ZB, C-ZC, C-ZD, C-ZE, C-ZF, C-ZG, C-ZH, C-ZI, C-ZJ, C-ZK, C-ZL, C-ZM, C-ZN, C-ZO, C-ZP, C-ZQ, C-ZR, C-ZS, C-ZT, C-ZU, C-ZV, C-ZW, C-ZX, C-ZY, C-ZZ, C-AA, C-AB, C-AC, C-AD, C-AE, C-AF, C-AG, C-AH, C-AI, C-AJ, C-AK, C-AL, C-AM, C-AN, C-AO, C-AP, C-AQ, C-AR, C-AS, C-AT, C-AU, C-AV, C-AW, C-AX, C-AY, C-AZ, C-BA, C-BB, C-BC, C-BD, C-BE, C-BF, C-BG, C-BH, C-BI, C-BJ, C-BK, C-BL, C-BM, C-BN, C-BO, C-BP, C-BQ, C-BR, C-BS, C-BT, C-BU, C-BV, C-BW, C-BX, C-BY, C-BZ, C-CA, C-CB, C-CC, C-CD, C-CE, C-CF, C-CG, C-CH, C-CI, C-CJ, C-CK, C-CL, C-CM, C-CN, C-CO, C-CP, C-CQ, C-CR, C-CS, C-CT, C-CU, C-CV, C-CW, C-CX, C-CY, C-CZ, C-DA, C-DB, C-DC, C-DD, C-DE, C-DF, C-DG, C-DH, C-DI, C-DJ, C-DK, C-DM, C-DN, C-DO, C-DP, C-DQ, C-DR, C-DS, C-DT, C-DU, C-DV, C-DW, C-DX, C-DY, C-DZ, C-EA, C-EB, C-EC, C-ED, C-EE, C-EF, C-EG, C-EH, C-EI, C-EJ, C-EK, C-EL, C-EM, C-EN, C-EO, C-EP, C-EQ, C-ER, C-ES, C-ET, C-EU, C-EV, C-EW, C-EX, C-EY, C-EZ, C-FA, C-FB, C-FC, C-FD, C-FE, C-FF, C-FG, C-FH, C-FI, C-FJ, C-FK, C-FL, C-FM, C-FN, C-FO, C-FP, C-FQ, C-FR, C-FS, C-FT, C-FU, C-FV, C-FW, C-FX, C-FY, C-FZ, C-GA, C-GB, C-GC, C-GD, C-GE, C-GF, C-GG, C-GH, C-GI, C-GJ, C-GK, C-GL, C-GM, C-GN, C-GO, C-GP, C-GQ, C-GR, C-GS, C-GT, C-GU, C-GV, C-GW, C-GX, C-GY, C-GZ, C-HA, C-HB, C-HC, C-HD, C-HE, C-HF, C-HG, C-HI, C-HJ, C-HK, C-HL, C-HM, C-HN, C-HO, C-HP, C-HQ, C-HR, C-HS, C-HT, C-HU, C-HV, C-HW, C-HX, C-HY, C-HZ, C-IA, C-IB, C-IC, C-ID, C-IE, C-IF, C-IG, C-I							

13. REMARKS Exhibits C-B, C-G, C-D, C-E & C-F were seized at 7902 Via Magdalena Los Angeles, California pursuant to a State Search Warrant #S-390. Exhibits seized by Det. Jim Bonar Burbank P.D. and maintained by him until 9-29-81 when he turned them over to S/A De Vorre. Exhibits maintained in L.A.D.9. Evidence Vault until 10-15-81 when S/A De Vorre removed and processed them.

14. SUBMITTED BY SPECIAL AGENT/INVESTIGATOR (Signature) <i>David L. Vorre</i>		15. APPROVED BY (Signature) <i>Bobby D. Sheppard</i>	
		A-612	
RECEIPT REPORT			
16. NO. PACKAGES <i>5</i>	17. RECEIVED FROM (Signature & Date) <i>David L. Vorre 10/16/87</i>	18. TITLE <i>5/14</i>	
19. SEAL <i>Broken</i> <input checked="" type="checkbox"/> Broken <input type="checkbox"/> Unbroken	20. RECEIVED BY (Signature & Date) <i>James D. Port 10-16-87</i>	21. TITLE <i>Att. Counselor</i>	
DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)			
22. Dow DEA-48	23. Exhibit	24. Authorizing Name	25. Means of Disposition
27. REMARKS			

APPENDIX C

20. ANALYST (Signature)	21. DATE	22. APPROVED BY (Signature)	23. DATE
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ACQUISITION OF NON-DRUG PROPERTY AND REGULATORY SEIZURES

1. PROPERTY CUSTODY <input type="checkbox"/> Seizure <input checked="" type="checkbox"/> Transfer to Another Agency	2. TYPE OF PROPERTY <input type="checkbox"/> MONEY <input type="checkbox"/> RECEIVED <input type="checkbox"/> SEIZED <input type="checkbox"/> REGULATORY <input type="checkbox"/> FILM/FINGERPRINTS <input checked="" type="checkbox"/> OTHER	3. FILE NO. R1-51-0265	4. G-DEP IDENTIFIER DA2-C2
	5. FILE TITLE LEON, Alberto Antonio et al.	6. CUSTOMS REFERRAL <input type="checkbox"/> Case No. OR <input type="checkbox"/> Seizure No. No.	7. DATE PREPARED 10-15-81
		8. PROGRAM CODE	

10. NAME AND DESCRIPTION OF ARTICLES	11. COND. CODE	12. VALUE
(C-3) - Miscellaneous ripped paper and twine.	S	N/A
(C-4) - Postcard addressed to STEWART at 7902 Via Magdalena.	S	N/A
(C-5) - Gift wrapping paper, (used).	S	N/A
(C-6) - Four empty DIOSITOL bottles.	S	N/A
(C-7) - Grocery Bag with one wooden box and 2 cardboard boxes.	S	N/A

13. **REMARKS** Exhibits C-3, C-4, C-5, C-6 & C-7 were seized at 7902 Via Magdalena Los Angeles, California pursuant to a State Search Warrant #S-350. Exhibits seized by Det. Jix Donar Burbank P.D. and maintained by him until 9-29-81 when he turned them over to S/A De Vorre. Exhibits maintained in L.A.D.O. Evidence Vault until 10-15-81 when S/A De Vorre removed and processed them.

14. SUBMITTED BY SPECIAL AGENT INVESTIGATOR (Signature) David L. De Vorre	15. APPROVED BY (Signature & Title) Bobby R. Sheppard 4/61
---	--

16. NO. PACKAGES 5	17. RECEIVED FROM (Signature & Date) [Signature] 10/15/81	18. TITLE S/A
19. SEAL <input checked="" type="checkbox"/> Broken <input type="checkbox"/> Unbroken	20. RECEIVED BY (Signature & Date) [Signature] 10-15-81	21. TITLE Alt. Custodian

DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)		
22. Date DEA-48	23. Exhibit	24. Authorizing Name

27. **REMARKS**

28. ANALYST (Signature)	29. DATE	30. APPROVED BY (Signature)	31. DATE
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DISPOSITION OF NON-DRUG PROPERTY AND REGULATORY SEIZURE

1. TYPE OF SEIZURE <input type="checkbox"/> TREASURY CUSTODY <input type="checkbox"/> Seizure <input type="checkbox"/> Transfer to Another Agency	2. TYPE OF PROPERTY <input type="checkbox"/> MONEY <input type="checkbox"/> Recovered <input type="checkbox"/> Seized	<input type="checkbox"/> REGULATORY <input type="checkbox"/> FILM/FINGERPRINTS <input type="checkbox"/> OTHER	3. FILE NO. R1-31-0265	4. S-DEP IDENTIFIER DA2-C2
	5. FILE TITLE LEON, Alberto Antonio et al.		6. PROGRAM CODE	7. DATE PREPARED 10-15-81
8. CUSTOMS REFERRAL <input type="checkbox"/> Case No. OR <input type="checkbox"/> Seizure No.				

10. NAME AND DESCRIPTION OF ARTICLES	11. COND. CODE	12. VALUE
(C-L) One Silver colored Sifter.	S	N/A
(C-Y) Prescription bottle for A. LEON dated 4-14-80.	S	N/A
(C-N) Ripped receipt for a 100 pound Accuweigh scale.	S	N/A
(C-O) 2 bottles of INOSITOL.	S	N/A
(C-P) One carton of Zig-Zag papers.	S	N/A

13. REMARKS Exhibits C-L, C-Y, C-N, C-O & C-P were seized at 7902 Via Magdalena Los Angeles California pursuant to a State Search Warrant #S-330. Exhibits seized by Det. Jim Bonar Burbank P.D. and maintained by him until 9-29-81 when he turned them over to S/A De Vorre. Exhibits maintained in L.A.D.O. Evidence Vault until 10-15-81 when S/A De Vorre removed and processed them.

14. SUBMITTED BY SPECIAL AGENT/INVESTIGATOR (Signature) David L. De Vorre	15. APPROVED BY (Signature) Robert J. Shepherd
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16. NO. PACKAGES 5	17. RECEIVED FROM (Signature & Date) James D. Smith 10-15-81	18. TITLE 10-X-71111. Contention
19. SEAL Broken Unbroken	20. RECEIVED BY (Signature & Date) James D. Smith 10-15-81	21. TITLE

DISPOSITION (FOR EVIDENCE CUSTODIAN USE ONLY)					
22. Date DEA-48	23. Exhibit	24. Authorizing Name	25. Means of Disposition	26. Name	

27. REMARKS

28. ANALYST (Signature)	29. DATE	30. APPROVED BY (Signature)	31. DATE
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(72)

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14. SUBMITTED BY SPECIAL AGENT/INVESTIGATOR (Signature) David L. De Norre <i>D. L. De Norre</i>	15. APPROVED BY (Signature) Bobby L. Shepard <i>Bobby L. Shepard</i> A-66
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27. REMARKS

FD-302 (Rev. 11-27-70) - 7a Previous Editions are Obsolete. Copy 1 - Presentation

1. 2

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☐ Selfkeeping
☐ Transfer to Another Agency

~~C-45~~
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 C-4C
 C-4D
 C-4E

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14. SUBMITTED BY SPECIAL AGENT/INVESTIGATOR (Signature) David L. De Torre	15. APPROVED BY (Signature) E. J. Mc. St. Leonard	A/C
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18. SEAL ☒ Broken ☐ Unbroken

28. ANALYST (Signature)	29. DATE	30. APPROVED BY (Signature)	31. DATE
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Appendix D

DEA Form - 7a
(Rev. 10-20-90)

Previous Editions are Obsolete.

Copy 1 - Presentation

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE A. WALLACE TASHIMA, JUDGE PRESIDING

No. CR 81-907-AWT

UNITED STATES OF AMERICA, PLAINTIFF

v.

ALBERTO ANTONIO LEON; ARMANDO LAZARO SANCHEZ;
PATSY ANN STEWART; RICARDO ALBERT DEL CASTILLO,
DEFENDANTS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, January 11, 1981

Tuesday, January 12, 1981

M. LENOIR EDDY, CSR

Official Reporter

417 U.S. Courthouse

312 North Spring Street

Los Angeles, California 90012

(213) 628-2530

APPEARANCES:

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United States Attorney

ROBERT L. BROSIQ

Assistant U.S. Attorney

Chief, Criminal Division

By: ANSTRUTHER DAVIDSON

Assistant U.S. Attorney

Controlled Substance Unit

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[4] LOS ANGELES, CALIFORNIA,
 MONDAY, JANUARY 11, 1982; 2:19 P.M.

THE CLERK: Item 9, Criminal 81-907-AWT, United States of America v. Alberto A. Leon, Armando Lazaro Sanchez, Patsy Ann Stewart and Ricardo Albert Del Castillo.

Counsel, please announce your appearances.

MR. DAVIDSON: Good afternoon, Your Honor. Anstruther Davidson for the United States.

MR. COSSACK: Good afternoon, your Honor. Roger Cossack for Patsy Ann Stewart, who is present in the courtroom.

MR. VODNOY: Good afternoon, your Honor. Joseph Vodnoy on behalf of Armando Lazaro Sanchez, who is present in the courtroom.

I am going to associate also with Mr. Abzug, who will actually be arguing today.

THE COURT: Good afternoon.

MR. LICHTMAN: Good afternoon, your Honor. Jay Lichtman with Mr. Del Castillo, who is present.

MR. KAPLAN: Norman Kaplan, appearing on behalf of Mr. Alberto A. Leon, who is present.

THE COURT: Why not be seated.

We have, I guess, two classes of motions. The first motion, as I recall, is the motion to dismiss the indictment made by the defendant Stewart.

[5] As far as I can tell, I think all of the other defendants have joined in that. Does any defendant not join in that or does not want to join in that?

(No response.)

I have reviewed the papers on that motion, the moving papers and the Government's opposition. Who made that?

MR. COSSACK: I did, your Honor.

THE COURT: Mr. Cossack, did you make that motion?

MR. COSSACK: Yes, sir.

THE COURT: Do you want to argue it further?

MR. COSSACK: Your Honor, I would just state the following.

THE COURT: You do not have to repeat anything that is in the papers.

MR. COSSACK: I would just state that the Government's response to that motion, your Honor, there are some things that I do not believe are necessarily a threat in the Government's response.

The Government indicates that the reason the necessary materials were not put before the Grand Jury was that they were inculpatory rather than exculpatory, and, in reviewing the affidavits of Mr. De Vorre of the Police Department and the affidavit of the Burbank police reports, there is no indication, of course, that Security did not pick up all bags that were checked.

[6] In fact, the only information that the Police Department are able to come forward with, in terms of whether or not she was able to pick up a bag that was checked in Miami is in a statement contained in either the Burbank police report—strike that—in the affidavit for the search warrant—and what that statement is is as follows:

Your Honor, it just says that we received information that she had checked a bag in Miami. It is a hearsay statement made to a police officer, and no indication who that person was, whether it was a police officer's or employee of the airline, or who it was.

That is what they base the fact to be inculpatory evidence based on the fact that Mrs. Stewart failed to pick up the bag checked in Miami, and didn't pick it up in Los Angeles.

Moreover, your Honor, I think the situation is important. This is gratuitous testimony that came before the Grand Jury. There was absolutely no necessity for the Grand Jury to hear about a trip Mrs. Stewart took to Miami or Mr. Sanchez took to Miami unless there was something illegal happening in Miami, or something illegal happening that was being transported from Miami to Los Angeles.

In fact, the very opposite thing happened.

In fact, these two were the very subject of a stakeout and these two were stopped—Stewart and Sanchez—at [7] the airport; searched their bags with their consent. Found a small amount of marijuana of less than one ounce, and no

drugs at all were found. Now this is the scene where no drugs are seen where officers are investigating the matter.

I suggest to the Court that this is the kind of activity where the Courts are talking about guarding the activities of the Grand Jury.

I know I don't have to mention to the Court the expectability of problems with the Grand jury, but when you have a situation as you have here where you have some testimony about a trip to Miami, which I only tried to point out in my motion for the purposes of making the Grand jury believe that drugs were either purchased in Miami or brought back from Miami by Mr. Sanchez or Mrs. Stewart, and then contemporaneously getting off of the airplane, their own agents search and do not find any drugs, that issue is not brought to the Grand Jury, and the conclusion necessarily is that that testimony was necessarily deliberately withheld from the Grand Jury, well, it is clear that that is the kind of testimony that we want our Grand Jury to hear that it is being kept from them.

Now, I agree with the Government. In fact, these matters are traditionally looked upon by the courts and very rarely granted.

But in this situation, this seems to be a clear, [8] clear, clear violation of what the Grand Jury is supposed to be.

It seems to me that once you bring up that point about them going to Miami and then coming back from Miami, then I think you have to drop the other shoe and tell those people that the fact is we did check their luggage, we searched them personally, and they consented to that search, and nothing, no drugs were found.

I think what you have here is sort of a negative pregnant lift in the testimony before the Grand Jury.

You have a police officer, in fact that was the only independent witness to testify before the Grand Jury.

He gets up and says, "Yes, we are investigating these people for narcotics' violations. We watched them go and come back from Miami immediately thereafter."

"Now, Officer, isn't it a fact and isn't it true that drugs are smuggled in by boat and is much easier from the East Coast?"

"Oh, yes, because access is easier to them."

But the Grand Jury is then led to believe that they somehow a few days later meet their contact, and somehow are led to believe that they get off their plane a day or so later; their residences are searched, and contraband was found.

And the only thing the Grand Jury could reasonably [9] come up with would be that they must have brought this contraband back from Miami on that trip to Los Angeles, and the Grand Jury is intentionally not told that that is not true.

And I submit to the Court that that is not what the courts have said it is about, and I will submit that motion on that ground.

THE COURT: Mr. Davidson, do you want to respond?

MR. DAVIDSON: Well, I really don't have anything to add to the moving papers, your Honor.

I believe the recent law in the Leverage Funding case and the Trass case is quite clear, even granting this to be an exculpatory matter, which I suggest it is not.

All that the Grand Jury was told was that they went to Florida and never intended to bring drugs back and forth with them.

I would respectfully request that the motion be denied on those grounds.

MR. COSSACK: Your Honor, may I reply?

THE COURT: No. He is responding to your argument. I am going to deny the motion. I think it is exculpatory, not inculpatory.

The other circumstances may be inculpatory, though that isn't the issue here.

The other circumstance is the issue of whether that [10] piece of evidence should have been disclosed to the Grand jury so that they knew that only a small amount of narcotics had been disclosed upon search.

Although it is exculpatory, I think Leverage Funding is very clear that the prosecutor is not required to present exculpatory evidence to the jury. I do not think it was a matter of great moment and would not change the vote of the Grand Jury.

I do not think it was particularly overreaching, and does not seem overly prejudicial; so the motion to dismiss the indictment is denied.

We have a number of other motions and a number of defendants who wish to suppress evidence, quash the search warrant, et cetera.

I want to make sure everybody has a chance to state what motion they are making.

First, Mr. Kaplan.

MR. KAPLAN: Yes, your Honor.

THE COURT: On behalf of defendant Leon, tell me what is your motion? What are you going to request to be suppressed?

MR. KAPLAN: My motion is to suppress the evidence found on Mr. Leon at the time of his arrest, and also the search of the residence—a question as to standing as to his own residence since the Government raised this direct [11] in their response.

I do have an inquiry, your Honor. I don't believe there is an issue as to standing as to his own residence.

Since the Government raised this directly in their response, a number of the attorneys for the defense would like to inquire, your Honor, if there is a problem on standing we would like the opportunity to remedy it, because I have an affidavit showing that Mr. Leon resided at the Sunset Canyon residence.

But I assume because the affidavit of the officer brought before the Magistrate and in the warrant itself they brought this before the Magistrate, and we assume there would be no problem on standing.

If the Court feels there is a problem, we do have an affidavit to submit, or perhaps the Government would be willing to stipulate.

This is only on his home.

THE COURT: You had better submit your affidavit, because I do not want you to take the position later that you feel you were cut off then.

MR. KAPLAN: Thank you, your Honor.

THE COURT: Mr. Abzug.

MR. ABZUG: Yes. Good afternoon, your Honor.

THE COURT: What is your motion, the grounds of your motion?

[12] **MR. ABZUG:** Mr. Sanchez seeks to suppress the results of the search at 620 Price Drive, as well as the obtaining of statements which he made shortly after the search which we claim are the fruits of an unlawful search.

In addition, we seek to join and have filed a joinder with all of the other motions of the defendants.

THE COURT: Well, in what motions have you joined in?

MR. ABZUG: I beg your pardon?

THE COURT: I say, in what motions have you joined in? In other words, I want to know exactly what your moving position is. 620 Price Drive and where else?

MR. ABZUG: A search at the Magdalena address which we are seeking to join in, as well.

THE COURT: Mr. Cossack.

MR. COSSACK: Yes. On behalf of Mrs. Stewart, we are joining Mr. Lichtman's motion.

We are attempting to suppress the search at 620 Price Drive and 7902 Via Magdalena.

Now, I, too, have a question as to whether or not standing is an issue in this matter in that the Government originally referred to my client, Patsy Stewart, as a resident of 620 Price Drive. I don't think there is anyone here claiming, nor does she claim to be a resident of other than 620 Price Drive.

I am prepared to send out and file an affidavit on [13] the fact that she does reside at 620 Price Drive.

The Government's papers refer to her as being the person who pays the utilities at 7902 Via Magdalena.

THE COURT: Just a minute. You are moving on 620 Price Drive and where else?

MR. COSSACK: 7902 Via Magdalena.

THE COURT: I think you should file whatever you have.

MR. COSSACK: Yes, sir.

THE COURT: Now, is that it for you?

MR. COSSACK: Yes, sir.

THE COURT: All right. Then Mr. Lichtman.

MR. LICHTMAN: Yes, your Honor.

THE COURT: What are you moving on?

MR. LICHTMAN: As we have detailed in the motion, we are moving to suppress the searches of the Price Drive residence, the Via Magdalena residence, as well as Sunset Canyon; as well as all of the vehicles and all of the safe deposit boxes.

The reason that we are requesting so much is under the precarious standing doctrine of California, that any evidence that would be introduced at the proceeding would be subject to a suppression motion; therefore, we are moving to suppress any evidence that was obtained during the searches and seizures on September 21st pursuant to that state search [14] warrant that was issued.

THE COURT: Mr. Cossack?

MR. COSSACK: May I approach the clerk, your Honor?

THE COURT: Yes.

Let's do it this way. What do you want to be—

MR. LICHTMAN: Your Honor, I would like to say one other thing.

The one issue in our motion that we feel may require additional testimony or additional evidence is the manner in which the warrant was executed, and there is a declaration from Officer Rombach submitted with the Government's opposition regarding the execution of the warrant.

We would like to cross-examine Officer Rombach solely on the execution issue, and perhaps put on some testimony for the defendants regarding the manner in which the search was made.

That would be our intention in presenting that motion.

MR. COSSACK: Your Honor, I have testimony of Rombach, too.

As I was told this, the way I have seen it there is a similar conflict of what appears in the reports of the Burbank Police Department and one affidavit in the search warrant. I may have some questions on a conflict, your Honor.

THE COURT: As far as the defendants are concerned, [15] all you want to do is cross-examine that one officer and then maybe put on some evidence on your own?

Is that right?

MR. LICHTMAN: Yes, your Honor.

MR. COSSACK: Well, there are other officers here who were present at the arrest.

THE COURT: Let me ask you this, the Government first: What do you want to be considered in support of this motion? Who is fully correct?

You filed one affidavit.

MR. DAVIDSON: One declaration of Officer Rombach we have an—

THE COURT: I assume you want the affidavit in support of the application for the warrant to be issued— I mean to be considered, too. Right?

MR. DAVIDSON: Yes, your Honor.

We don't reproduce it, but it is attached to Mr. Del Castillo's motion.

THE COURT: I assume you want the affidavit in support of the warrant to be issued and to be considered by the Court?

MR. DAVIDSON: Yes, your Honor.

We didn't reproduce it because it is attached to Mr. Del Castillo's motion.

THE COURT: All right.

[16] MR. DAVIDSON: Your Honor, the only other matter is with respect to the arrest of Mr. Leon.

My understanding of the pleadings were that there was no evidence submitted or declaration in conformance with the local rules by this defendant, particularly by Mr. Kaplan on his motion as regards the arrest issue. If that issue is to be litigated or if he is to present evidence on that, then we would be prepared to submit evidence on the arrest of Mr. Leon. That would be the only other matter.

THE COURT: There is no affidavit on that?

MR. KAPLAN: As to Rule 11?

THE COURT: Yes.

MR. KAPLAN: Well, your Honor, the affidavit of David De Vorre that accompanied the Magistrate's complaint indicated that he had been arrested, and that narcotics were taken from his person, and that would be sufficient re a search of his person.

THE COURT: You don't raise any questions under Rule 11, which says you are supposed to file an affidavit to show what the facts are that you are going to prove?

MR. KAPLAN: That there wasn't sufficient probable cause for conducting the arrest that burdenalized or required the Government to satisfy that request.

THE COURT: What evidence, if any, do you intend to present today in support of that motion aside from what [17] is already in the record? Is there anything?

MR. KAPLAN: Nothing today, your Honor. Merely the fact that—

THE COURT: So he is not calling any witnesses, Mr. Davidson? It is just a matter of getting it on the record; right?

MR. KAPLAN: Your Honor, perhaps I should make a further comment. Unless the Government takes the position that he wasn't arrested, then I would have to put him on. I don't think there is any question—there should be none—especially in fact that the affidavit of the officer that Mr. Leon was arrested, and I refer to the Court files in the affidavit and the support of the Magistrate so indicating that.

On the second page, No. 8 Sunset Canyon, was taken into custody at that time. He had a white ring of powder around his nostril; a vial of narcotics, cocaine, that was seized in evidence. And the motion to suppress evidence of that is already in the affidavit in the court records.

THE COURT: Mr. Davidson.

MR. DAVIDSON: Your Honor, I don't believe this is being done the way the rules call for. However, I would like, no matter what happens, considering the illegality of that arrest, to call Mr. De Vorre, who is present, to briefly recount those facts.

[18] **THE COURT:** I think we should do it this way: I think that, in addition to what is in the file—the papers, the affidavits—the Government has one additional piece of evidence. I think we should put him on and can cross-examine him any way you want.

MR. KAPLAN: Fine, your Honor.

MR. ABZUG: On behalf of Mr. Sanchez, your Honor, his standing in the moving papers to request the search at the 620 Price Drive address because indeed they allege that he lived there throughout the papers; but, out of an abundance of caution, and I would, of course, like to put him on the stand and take him on cross-examination.

THE COURT: Well, let me ask Mr. Davidson: Do you contest his standing in the sense of what he claims—Mr. Abzug—that he was at that address at that time?

MR. ABZUG: Yes, your Honor. We claim that he lived there five months prior to—

THE COURT: Will you stipulate to that?

MR. DAVIDSON: I will stipulate that he testified—

THE COURT: The stipulation is that the defendant Sanchez, if he were called, would testify that he lived at the—

MR. ABZUG: —620 Price Drive, your Honor.

THE COURT: On September 21, 1981 he resided at 620 Price Drive in Burbank?

[19] MR. ABZUG: Yes, your Honor.

THE COURT: And that he would so testify?

MR. ABZUG: I am satisfied at that period.

MR. DAVIDSON: Fine.

THE COURT: Will that be satisfactory?

MR. DAVIDSON: I would then all Agent David De Verre.

MR. COSSACK: May I ask that all of the police officers—I don't know if there will be any—be excluded from the court?

THE COURT: All right?

Do you have any possible witnesses?

MR. DAVIDSON: Yes, your Honor, I have. I asked them to leave.

THE COURT: And that includes not only police officers but—

MR. LICHTMAN: Yes, your Honor. I have asked them to leave, and they are leaving now.

THE COURT: That will be not only police officers but defense witnesses.

MR. LICHTMAN: Yes, your Honor. I will see to it that they leave because that would involve witnesses on either side.

(Brief pause.)

THE COURT: Swear in the witness.

[20] DAVID L. DeVORRE,
called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated.

(Witness complies.)

Please state your full name for the record and spell your last name.

THE WITNESS: David L. De Vorre, D-e V-o-r-r-e.

DIRECT EXAMINATION

BY MR. DAVIDSON:

Q. Mr. De Vorre, are you a Special Agent of the Drug Administration?

A. Yes, I am.

Q. How long have you been employed in tht capacity?

A. Almost 11 years.

Q. Now, on September 21, 1981, did you participate in the execution of a search warrant at a number of locations including the location 716 South Sunset Canyon in Burbank, California?

A. Yes, I did.

Q. Approximately what time of day were you at 716 Sunset Canyon?

A. I'm not sure of the hour. It was late, though.

[21] Q. And who else was there with you?

A. Several Burbank police officers—narcotics officers.

My partner, Special Agent Dromgoole, Officer Rombach of the Narcotics Division, Burbank PD.

Q. And what did you observe when you first arrived?

A. On our arrival there had been a surveillance team already in position at the residence; we observed a Corvette—

MR. KAPLAN: I have to object. Rather than what he testifies, or what he observed, I think he should testify as to what he saw.

THE COURT: The objection is sustained.

THE WITNESS: Upon arrival at the location I observed a Corvette parked, I believe, on the south side of the house facing Sunset Canyon.

We were there on a very—I was there a very brief time when two males were observed walking out of the house toward the Corvette.

There was a radio transmission to proceed to the residence to begin the execution of the search warrant, at which time myself and one of the Burbank officers walked up to one of the two gentlemen that was approaching the Corvette, and advised him that we were police officers, and were approaching the rear door of the Sunset Canyon residence, [22] and to just stand by.

There were a lot of things occurring at the residence, and we simultaneously—there were officers approaching the door, and then we were detaining Mr. Leon as he was subsequently identified to me as Mr. Leon.

BY MR. DAVIDSON:

Q. Let me stop you there.

Did you detain one person or two persons?

A. Two persons.

Q. Were you one of the officers detaining those individuals?

A. Yes, I was.

Q. And was one of those individuals Mr. Leon?

A. Yes, it was.

Q. And how at first were you detaining them?

A. We just walked up to them and identified myself as a police officer, and "Would you please put your hands on the car," and he cooperated at that time.

Q. This was Mr. Leon?

A. That's correct.

Q. Did the other individual place his hands on the side of the car?

A. Yes. There were other officers on his side of the car with him.

[23] Q. Now, could you describe what you observed about Mr. Leon at that time?

A. Well, as he was leaning up against the Corvette, he kept turning around, looking over his left shoulder and right shoulder.

At about that time I noticed that his eyes were somewhat glassy. Well, about when he turned around at one point I noticed he had a white ring of what appeared to be powder around his nose.

He seemed to be somewhat agitated, not calmly; just resting up against the car waiting to find out what was occurring.

He just seemed to be very nervous and very agitated.

Q. What did you do at that time?

A. Well, at that time I put the handcuffs on him. I asked him to bring his right hand behind his back, and I put the handcuffs on him and closed them.

Q. Then what happened?

A. Shortly thereafter, Officer Rombach who had been at the rear residence entrance came back over to the car, and advised Mr. Leon that we were in the process of executing a search warrant at the residence, and that the back door was locked and secured, and would he please give us the key.

Q. And what did Mr. Leon say? Did he say anything?

[24] A. Yes. He said that the keys were in his pants pocket.

Q. What happened then?

A. As I had Mr. Leon in custody, I reached into I believe his right front pants pocket for the keys, and just pulled out everything I could get my hands on, and a set of keys was there in addition to other articles.

Q. What other articles did you find?

A. There was a wad of U.S. currency bills—several denominations—and a clear glass vial of white powder.

Q. Were the keys used to open the house?

A. Yes, they were.

Q. Was the house opened after you reached in the pocket?

A. Yes. I gave then the keys to Detective Rombach.

Q. And then what occurred?

A. (No response.)

Q. Let me ask the question the other way: Was the search executed in the house?

A. Yes, that's correct.

Q. What happened to Mr. Leon?

A. He was—M'mm—I believe he was taken back inside, and I can elaborate.

Detective Rombach and myself and other police officers were in a van, a police van, and we were—

MR. KAPLAN: Pardon me, just one moment. I hate to [25] object, your Honor, but this is not responsive to the question.

We are going into an area of—

THE COURT: The objection is sustained.

Reask him the question.

BY MR. DAVIDSON:

Q. What did you do after the keys were used to open the house and when the search was begun in the house?

A. Oh, Mr. Leon was taken, I believe, into the house and he remained there.

I then departed with Detective Rombach in the police van.

(Brief pause.)

Q. At the time that you put the handcuffs on Mr. Leon had you formed an opinion in your own mind as to whether or not he might have ingested or breathed any controlled substances?

A. Yes, I did.

Q. Well, first of all, what was that opinion?

MR. KAPLAN: I'm going to have to object. This is very suggestive and leading, and I think highly improper to ask the question in that form.

THE COURT: The objection is overruled.

You may answer the question.

THE WITNESS: I'm sorry. Can you repeat the question?

[26] BY MR. DAVIDSON:

Q. Did you have an opinion as to what, if anything, Mr. Leon had taken?

A. Yes.

I had formed an opinion that he had ingested cocaine due to the white ring around his nostril.

Q. Did you base that opinion upon anything else besides the white ring around his nostril?

A. Yes.

During the investigation, it came to my knowledge that Mr. Leon had been arrested for possession of dangerous drugs at one time.

Q. Did you form that opinion based upon any other observance of Mr. Leon at the time?

A. His agitated state and his eyes, mainly.

Q. Had you previously in your work as a Drug Enforcement Administration officer, seen people who were—who had used cocaine?

A. Yes, sir.

MR. DAVIDSON: I have no further questions, your Honor.

THE COURT: Any cross?

[27] CROSS-EXAMINATION

BY MR. KAPLAN:

Q. Agent De Vorre, when you went to the location on Sunset Canyon, you went to execute the search warrant; is that correct?

A. That's correct, yes, sir.

Q. You did not have in your possession a warrant for the arrest of Mr. Leon, did you?

A. That is correct.

Q. You did not have in your possession a warrant for the search of the person of Mr. Leon?

Is that correct?

A. That's correct.

Q. When you arrived at the Sunset Canyon address, you stated you were there for a brief period of time. How long a period of time would you say?

A. I—It would have been several minutes.

Probably not more than 10 minutes.

Q. During that 10 minutes, you say that you received a radio transmission as to the continuation of the warrant?

A. Yes, that's correct.

Q. Do you recall if it was immediately prior—at the conclusion of 10 minutes or at the beginning of the 10 minutes that you were there?

A. Oh, I couldn't say.

[28] Q. When you received the radio transmission, how long did you wait before you saw two men leave the residence?

A. The radio transmission came after they were observed walking out of the residence toward the car.

Q. Do you know who the other person was other than Mr. Leon?

A. I—If I may, there were two other subjects that were arrested in the case that were not filed upon.

One of them has a last name of Gerald, and I'm not sure about the other person.

Q. Was the person Gerald the person walking with Mr. Leon when leaving the house?

A. I don't recall right now.

Q. Did you make any notation who the other person was?

A. Not right there at the scene.

Q. Did you make any notations at a later time—not at the time—but at a later time who that person is by name or identity?

A. I believe it may be in the Burbank police report.

Q. That second person was also detained—I believe both were detained at that same time?

A. Yes, sir.

Q. You stated that you placed their hands on the car, both persons?

[29] Is that correct?

A. It is just dealing with Mr. Leon on one side of the car.

Q. I see.

Now, his car was parked on a public thoroughfare, was it not—on the street?

A. Are you speaking of the Corvette?

Q. Yes. The car on which the hands were placed?

A. Yes, it was.

Q. Did you have him lean against the car at that time?

Did you conduct a patdown search or a search for weapons?

A. Yes, I did.

Q. Did you recover any weapons?

A. No, sir.

Q. Prior to arriving at that location, Agent De Vorre, you didn't have any knowledge that he was presently—and when I spoke of "he" I mean Mr. Leon—was presently armed, did you?

A. No, sir.

Q. When Mr. Leon was told to place his hands on the car and he was detained at that time, and you conducted your patdown search, he was not free to leave, was he?

A. No, sir.

Q. Did you have a warrant for the arrest or search [30] of the other person that was with Mr. Leon?

A. No, sir.

MR. KAPLAN: I have nothing further.

THE COURT: Any other cross?

MR. ABZUG: No, your Honor.

THE COURT: Any questions from the defendants?

MR. COSSACK: No, your Honor.

But there is a possibility I may wish to call the agent regarding the execution of the warrant on the Price Drive residence, but no questions on this.

THE COURT: Any other questions, Mr. Davidson?

MR. DAVIDSON: No, your honor.

THE COURT: Let me ask you a question, Agent De Vorre.

EXAMINATION

BY THE COURT:

Q. Is it regular DEA procedure when you are about to execute a search warrant that you detain anybody who happens to be at the place that is to be searched?

A. Yes, sir.

Q. Was there any other reason besides then why you detained these persons as they came out of the Sunset Canyon address?

[31] A. No, sir.

THE COURT: All right, Anything else?

MR. DAVIDSON: I have nothing else.

THE COURT: You may step down now.

We are going to take a recess at this time because I have to go back to something on the motion calendar. But it will be brief—say maybe we will take a little break of about 10 minutes or so.

What do you want to do next? Do you want to cross-examine? Do you have anything else? Is that right?

MR. DAVIDSON: I have nothing else.

I guess the next thing for them would be to cross-examine Officer Rombach.

THE COURT: Then you want cross-examination of Mr. Rombach?

MR. COSSACK: Yes, your Honor.

THE COURT: Then get together because we will take a 10-minute break.

(Proceedings in the foregoing were recessed at 2:55 p.m.)

(Proceedings in unrelated matter heard.)

[32] LOS ANGELES, CALIFORNIA,
MONDAY, JANUARY 11, 1982: 3:22 P.M.

THE COURT: Let's get our next officer up here for cross-examination.

MR. LICHTMAN: I would ask for Officer Rombach.

THE COURT: Officer, will you come up and be sworn, please.

CYRIL A. ROMBACH,

Called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please be seated.

(Witness complies.)

State your name, spelling your last name for the record.

THE WITNESS: Cyril A. Rombach, R-o-m-b-a-c-h.

DIRECT EXAMINATION

BY MR. DAVIDSON:

Q. Officer Rombach, you are an officer with the Burbank Police Department.

Is that right?

A. Yes.

Q. You executed a declaration dated January 5, 1982, [33] appended to the Government's motion.

You are that Cyril A. Rombach, are you not?

A. Yes.

Q. Did you participate in a search of the 620 Price Drive residence on September 1st[sic], 1981?

A. Yes.

Q. Was that at approximately 5:30 p.m.?

A. Yes, sir.

Q. How many officers were with you on that search?

A. I believe there was a total of eight or nine.

Q. And approximately seven of them were wearing Raid jackets?

A. I believe most of the officers were wearing Raid jackets. I can't say if all of them were.

Q. Were all of the officers armed?

A. Yes.

Q. And they were armed with shotguns and rifles?

A. That's not correct.

Q. Roughly how many were armed with shotguns and rifles?

A. Maybe two or three with shotguns.

There were no rifles.

Q. And the other officers had handguns.

Is that correct?

[34] A. Yes.

Q. when you approached the 620 Price Drive, did any of the officers go to the rear of the residence?

A. Yes.

Q. How many officers?

A. Two.

A. And who were they?

A. Detective Bill Allen and Detective Larry Hoeschen.

Q. Did the remainder of the officers go to the front of the residence?

A. Yes.

Q. And you were then located at the front of the residence?

A. Yes.

Q. When you were located at the front of the residence, did you hear Detective Allen say anything?

A. Yes.

Q. Detective Allen now is at the rear of the residence. Correct?

A. That's correct.

Q. What did Detective Allen say?

A. He said "Hold it," along with some other words that aren't too nice.

Q. Well, without going into those words, what was the [35] essence of what he said to inform or to order the people that were in the rear of the residence to cease movement?

Would that be a fair characterization?

A. I believe they were in the rear yard at the residence, and that would be a fair characterization of it, yes.

Q. Was Detective Allen one of the detectives who had a shotgun?

A. I believe he did.

Q. And was the other officer with him, was he the other officer who had the shotgun?

A. I don't know what Detective Hoeschen was armed with.

I believe one of the other officers in the front also had a shotgun.

Q. When you heard Detective Allen say this, was it true that Detective Allen was yelling?

A. Yes.

Q. After Detective Allen told the occupants to cease their movement, was there anything that you were aware of that they did at that time where they did not comply with the detective's orders?

A. Yes.

Q. What was that?

A. He repeated it at—he repeated his order to them.

[36] Q. Other than repeating the order, was there any other indication?

A. From that point on I was a little busy at the front door. I could hear Allen talking.

Q. I am asking just to the point did you hear Detective Allen say for the first time, "Stop," and whatever he did say? Whatever he did yell at that time, was there any other occasion other than the fact that he repeated it which gave you the impression that the people he was addressing were not complying with his directions?

A. I could hear people running inside of the residence.

Q. Now, this was occurring at the time Detective Allen was making these statements?

A. Just about the same time, yes. Maybe shortly thereafter.

Q. Just jumping ahead for the moment, these two individuals who were in the rear of the residence, as you found out, after you went into the residence, were Mr. Sanchez and Miss Stewart.

Is that right?

A. Yes.

Q. Now, the first time you did anything or took any action at the front door was after you heard Detective Allen making these statements.

[37] Is that right?

A. Yes.

Q. And what actions did you personally take at the front door?

A. Another officer knocked, and I yelled in a loud voice, "Police. We have a search warrant. Open the door."

Q. Did you say anything else?

A. No.

Q. Now, after you said that, did you hear any response from anyone inside of the residence?

A. All I heard was—

Q. Well, answer the question, please.

A. Yes.

Q. And what did you hear?

A. The sound of running.

Q. Did you hear any verbal response?

A. No, sir.

Q. Did you hear any verbal response to your question or to your directive at any time prior to your entering into the residence?

A. Yes.

Q. What was that?

A. All I could hear was voices coming from within the residence.

[38] It was—I couldn't understand what they were saying.

They were talking in an extremely fast, excited manner.

Q. What language were they talking in?

A. Pardon me?

Q. What language were they talking in?

A. I believe it was English, but I don't know.

Like I say, I couldn't understand what was being said.,

Q. Other than that, did you hear anything else being said in the residence?

A. No.

Q. You state in your declaration that you were in fear that there was contraband being destroyed inside of the residence, and that the people inside were arming themselves.

Is that right?

A. Yes.

Q. Other than the fact that you heard running and heard speaking, was there any other reason that you based that fear on?

A. Just my prior experience.

Q. Well, other than your prior experience, was there anything else that happened that you based that fear on?

[39] A. No.

Q. Did the occupants of the residence at the time say anything that indicated they knew the police were at the front door?

A. No.

Q. Now, how did you enter the residence—or let me ask it more directly.

Isn't it true that you and the other officers at the front door broke down the front door to enter?

A. That is true.

Q. How did you go about breaking down that front door?

Did you have some instruments to do that?

A. Yes.

Q. And what were they?

A. A small, I guess you would call it a battering ram.

Q. You used that to batter down the door?

A. I didn't.

Q. One of the officers with you did; isn't that right?

A. Yes.

Q. And when you entered the residence, once you were inside, who was inside of the residence?

A. Mr. Del Castillo, I believe, was just inside the front door. There was another gentleman seated in the living room area.

[40] Q. Was that Mr. Jerro, Juan Jerro?

A. Jerro, yes.

Q. Were there any other people inside the residence?

A. Not that I recall.

Q. Subsequent to this, you conducted a search of this residence.

Is that right?

A. A search was conducted.

Q. You participated in the search, didn't you?

A. No.

Q. You were present in the residence when the search was conducted, weren't you?

A. No.

Q. You left the residence after the search and you broke in?

A. After it was secure, yes.

Q. You did not return to the residence?

A. Approximately an hour or an hour and a half later, yes.

Q. Without going into detail as to where contraband items were found, if there were any, do you know what rooms of the residence the search concentrated in?

A. I believe all of the rooms of the residence were searched.

[41] Q. Do you know where most of the items were taken from?

A. I believe the bedroom and living room area.

Q. Wasn't it for sure that most of them were taken from the bedroom only?

A. I can't answer that question because I did not conduct the search.

Q. When you entered the residence and Mr. Jerro and Del Castillo were there inside, did they immediately submit to your authority and give you no resistance?

A. That's correct.

MR. DAVIDSON: No further questions, your Honor.

THE COURT: Who is next?

MR. COSSACK: I believe I am, your Honor.

CROSS-EXAMINATION

BY MR. COSSACK:

Q. Officer Rombach, are you the affiant in the search warrant, aren't you?

A. Yes.

Q. In the search warrant, you indicated you had a conversation with a person named Armando and Patsy.

Is that correct?

A. Yes.

[42] Q. You indicated that you were contacted by confidential informants in August of 1981.

Is that correct?

A. Yes.

Q. Were you contacted by the confidential informant or were you contacted by someone else?

A. I was contacted by the informant.

Q. All right. Was the informant in custody of a police officer at that time?

A. No.

MR. DAVIDSON: Objection, your Honor, as going outside of the scope of the affidavit. The affidavit speaks for itself.

And, failing any false statement of which there has been no allegation on this, testimony on probable cause would be irrelevant.

MR. COSSACK: Your Honor, if I might state this: the case of *People v. Theodore*, which is the leading California case so far as known on search warrants, I would be allowed to go behind the face of the search warrant and the search warrant.

As the Court knows, we made a motion to find out who that informant was, and that motion was denied.

This is going to be my chance, at least, to talk to Officer Rombach about what he heard from that informant.

I think the California case allows me to do that, [43] and I would ask the Court to allow me to ask these questions.

THE COURT: I don't believe whatever else the informant may have told him on the search warrant is relevant, so the objection is sustained.

MR. COSSACK: Very well, your Honor.

BY MR. COSSACK:

Q. Officer Rombach, did the informant that you spoke to, was it August 18th that you spoke to the informant?

A. Yes.

Q. Was the informant—did the informant receive any kind of reward or lesser sentence or help from the Police Department for giving the information?

MR. DAVIDSON: Objection, your Honor.

THE COURT: The objection is sustained. Same subject matter.

MR. COSSACK: Pardon me?

THE COURT: I think that is the same subject matter, and according to the previous objection, it is sustained.

MR. COSSACK: Very well, your Honor.

BY MR. COSSACK:

Q. Officer Rombach, were you the author of the Burbank police reports that were compiled in this matter?

A. The initial crime report, yes.

[44] MR. COSSACK: Your Honor, may I approach the witness and show him this?

THE COURT: Yes.

MR. COSSACK: Thank you.

(Counsel approaches witness.)

BY MR. COSSACK:

Q. Officer Rombach, I am showing you what appears to be a Xerox copy of a document entitled "Burbank Polcie Department, page 3."

Are you the author of this?

A. Yes.

Q. Officer Rombach, did you take any notes when you debriefed the informant on August 18th, 1981?

A. No.

Q. Did you make any notes whatsoever that were contemporaneous in speaking to the informant on August 18th, 1981, regarding your conversation with the informant?

A. I don't believe so.

Q. When was the first time that you attempted to put down on paper what the informant had told you on August 18, 1981?

A. Several days later.

Q. Could you be more specific than several days? Was it more than a week?

[45] A. Would have been approximately four to five days.

Q. After August 18th?

A. Yes.

Q. Now, was that a handwritten report or a typewritten report?

A. On what the informant had told me, sir?

Q. Yes.

A. It was handwritten eventually.

Q. Was that then made into a typewritten report?

A. Yes.

Q. Is that typewritten report contained in the Burbank police report that I have just shown you?

A. It is actually more accurately depicted in the affidavit attached to the search warrant.

Q. When was the affidavit on the search warrant written?

A. It was an ongoing thing. I started writing several days after my contact with the informant.

Q. The statement of probable cause, is that part which is considered the part that you supplied in this search warrant?

Is that correct?

A. Yes.

Q. When did you first begin this affidavit?

A. I believe it was around the 25th of August—the [46] 25th or 26th—somewhere around there.

Q. Did you entitle that “Statement of Probable Cause”?

A. Yes.

Q. In other words, the affidavit for the search warrant as we see it here today was first started by you approximately one week after your talking to the informant?

A. Not entitled as it is, but the narrative portion was begun by me approximately then, yes.

Q. Do you have your copies—did you bring your copies of the narrative portion with you to this court today?

A. The only document I have are Xerox copies just like you have.

Q. In other words, when I have shown you the document entitled “Burbank Police Department,” was in fact what you started some days after you started talking to the informant.

Is that correct?

A. No.

Q. I have a document entitled “Burbank Police Department,” and I have a statement of probable cause.

Do you have anything else regarding your conversation with the informant?

A. No.

Q. All right. Is everything that the informant told you contained within the statement of probable cause and [47] the Burbank Police Department that I showed you?

A. Yes.

Q. When was it that you wrote—How soon after your discussion with the informant did you write the worst of the statements that the informant stated that the subject known to him as Armando sold him nothing less than half-pound quantities, and the female you had known as Patsy sold methaqualude tablets in quantities not smaller than 500 or 400 at a time?

When did you write that?

A. Just shortly after that.

Q. Do you have the original of that when you transmitted that from memory to paper?

A. No.

Q. What happened to the original of that?

A. I believe it was thrown away.

Q. Now, is it Burbank police policy that when you debrief an informant that you are to make an immediate report of your debriefing?

MR. DAVIDSON: Objection, your Honor, as calls for being irrelevant to the examination here.

The only issue—I concede there is some relevance to this line of questioning because if the defense can show perjury on the part of the witness, then they have got [48] something under *Franks v. Delaware*; but anything less than that—mere negligence or bad practice as to what the informant said are not relevant to a determination of alleged inadequacies in the search warrant.

THE COURT: The objection is overruled at this time.

THE WITNESS: Would you repeat the question, Counsel.

MR. COSSACK: Could the question be reread, your Honor?

THE COURT: Yes, please read the question.

(Record read by the reporter.)

THE WITNESS: No, it is not.

BY MR. COSSACK:

Q. You have no policy as to when the report should be put down in writing regarding the debriefing of an informant.

Is that correct?

A. Yes.

Q. Is that your testimony?

A. Yes.

Q. Now, the statement of probable cause which is contained as the affidavit for the search warrant, obviously was made after the notes that are contained in the Burbank [49] police report that I have shown you; isn't that correct?

MR. DAVIDSON: Objection as being argumentative, the word "obviously."

MR. COSSACK: I am sorry. I withdraw the word "obviously," Officer.

BY MR. COSSACK:

Q. Did you understand the question?

A. No, I didn't.

Q. Okay. What I am asking you is, the affidavit for the probable cause for the search warrant which is entitled "Statement of Probable Cause," that was prepared after you had prepared the Burbank police report?

A. No, sir.

Q. It was prepared prior to preparing the Burbank police report?

A. Yes.

Q. In other words, these documents I have shown you entitled "Burbank Police Reports," was made after the affidavit for the search warrant?

A. Well after.

Q. So the only documents which you can show us today which reflect your conversation with the alleged informant is what is contained in the affidavit for the search warrant.

Is that correct?

[50] A. That is correct.

Q. Now, is it your testimony, therefore, that this informant told you that this person was present in the house approximately five months ago and personally observed a sale of 500 methaqualude tablets that took place between Patsy and another person, and also that this person observed \$1,500 in a shoebox belonging to Patsy at the time of the transaction.

Is that correct?

A. Yes.

Q. And that was what the informant told you?

A. Yes.

Q. And the only notice you have of the informant's telling you of that is the statement contained in the statement of probable cause?

A. Yes.

Q. Can you tell us when the statement of probable cause was prepared?

MR. DAVIDSON: Objection, that has been asked previously, your Honor.

THE COURT: I think it has. But it is overruled.

Answer it one more time.

THE WITNESS: It was anywhere from three to five days after my conversation with the informant.

[51] BY MR. COSSACK:

Q. The parts that I just read to you?

A. Yes.

Q. But it wasn't prepared in the way we have in court today? That is as an affidavit for a search warrant, was it?

A. No, it was handwritten.

Q. It was handwritten, and then these handwritten notes were given to someone so that an affidavit for a search warrant could be prepared?

A. I wrote the affidavit for the search warrant, and it was given to a secretary to type.

Q. Were you assisted in this by a District Attorney?

A. No.

Q. So you took this affidavit for a search warrant, you remember to Judge Murphy?

A. Yes.

Q. Without the assistance of a Deputy Assistant Attorney?

A. I wrote it myself. I had three Deputy Assistant Attorneys who looked at it prior to taking it to the Judge.

Q. Is it your testimony, then, sir, that all of those comments that are contained in the Burbank police report and dated August 19th, August 24th, and August 26th, et cetera, were in fact not prepared until sometime in the middle of September after—until the affidavit for the search warrant was [52] prepared?

A. I don't understand your question.

Q. I am asking it, is it true, then, sir, that these documents that are contained in the Burbank police report that I showed you earlier that were not prepared, these Burbank police reports were not prepared until after the affidavit for the search warrant was?

A. Well after.

Q. Can you tell me approximately when?

A. I believe it was two to three days after the arrest which occurred on the 21st of September.

Q. And you have no other notes showing your interview with the informant that you could show us in court today?

A. No.

Q. Now do you have any notes of your conversation with the informant back at the police station or in your control?

A. No, I don't.

Q. And they have all been destroyed pursuant to a Burbank Police Department policy?

A. I don't know if it is policy.

Q. Well, does your department tell you what to do with your own notes that you make regarding cases?

A. No.

[53] Q. So it is up to you as to whether you decide to retain these notes or destroy these notes?

A. Yes.

Q. Is it your personal policy to destroy all of your original notes in matters like these?

A. After I read—

Excuse me. What I have transcribed and been sure it is accurate, if accurate I will normally throw the handwritten copies away.

Q. Now, in your Burbank police report that I showed you, you indicated that the informant furnished the investigating officer—strike that.

You indicated that the informant told you about the two people living at the 620 Price Drive address, and that one is named Armando and the other is Patsy, and that information regarding their activities; and then you state the following: The informant furnished the investigating officer with additional information which was subsequently utilized by investigating officer when preparing a search warrant for 620 Price Drive and other locations and vehicles.

Now, nothing else indicates in there—Strike that.

Is that—What other information was subsequently utilized by you in preparing the search warrant for 620 Price Drive?

[54] A. The information that is missing from the police report with regard to my conversation with the informant is present in the statement of probable cause and the affidavit of search warrants.

Q. And I take it then that you made a decision that the information that this informant had seen Patsy sell drugs and seen a great deal of cash in the apartment—in that residence—you felt was not germane to be included in the police report.

Is that correct?

A. No.

Q. That is not correct?

A. It is not correct.

Q. You did make a decision to leave that out?

A. Yes.

Q. All right. On what was that decision based?

A. Basically the entire search warrant was going to be attached on his part of the search warrant. I'd already written that one time.

It was extremely lengthy, and I did not really want to re-write the whole thing again verbatim into the police report, like I say, when I had already written it once.

Q. All of your dates in here—August 18th, 19th, 24, 25, 26, 27 of August, et cetera—those all indicate certain [55] notes that you made of events that happened on those dates.

Is that correct?

A. Yes.

Q. Did you destroy all of those notes?

A. Yes, when I wrote the affidavit for the search warrant.

Q. So that everything, all contents about the events as they actually occurred was destroyed.

Is that correct?

A. All of my rough, handwritten notes, yes.

MR. COSSACK: I have nothing further.

MR. LICHTMAN: Your Honor, I have a few questions that I neglected to ask.

Could I do that just briefly?

THE COURT: All right.

CROSS-EXAMINATION

BY MR. LICHTMAN:

Q. Officer, did you participate in the search of the Via Magdalena residence?

A. I was present.

Q. This search occurred approximately 7:00 to 8 o'clock p.m. that evening, do you recall?

MR. DAVIDSON: Objection as to relevance of this [56] line of questioning, your Honor, for two reasons.

I don't remember any specific allegations by defense as to what this witness did there in their moving papers; and, secondly, I would suggest that Mr. Del Castillo has shown no standing in the Via Magdalena address.

MR. LICHTMAN: Your Honor, we are addressing the question of the execution of the warrant at Via Magdalena which we did include on our brief, page 32, or thereabouts.

THE COURT: I am going to overrule that.

BY MR. LICHTMAN:

Q. Officer, did you arrive at the Via Magdalena residence at approximately 7:00 to 8:00 p.m. that evening?

A. I'd have to look at my report for the exact time, but I did arrive there.

Q. After you had already been at the Price Drive residence?

A. Yes, and one other.

Q. And the Sunset Canyon residence.

Is that right?

A. Yes.

Q. And the purpose of going to the Via Magdalena residence was for the purpose of executing the search warrant on that residence.

Is that right?

[57] A. Yes.

Q. And you had obtained a key for that residence from the Price Drive residence or from occupants in the Price Drive residence?

A. Yes.

Q. And when you arrived at the Via Magdalena residence, did you use the key to open up the front door?

A. I did.

Q. Did one of the officers with you use the key to open up the front door?

A. Yes.

Q. How many officers were there at the front of the Via Magdalena residence?

A. Five or six.

Q. Were they armed?

A. Yes.

Q. Were these the same officers who had been at the Price Drive residence earlier that evening?

A. Some of them had.

Q. Now, after you had entered the front door of the Via Magdalena residence, did you go upstairs?

A. Yes.

Q. And when you reached the upstairs landing, were the doors—did you attempt to enter any of the rooms upstairs?

[58] A. Yes.

Q. And isn't it true that those doors were locked?

A. Yes.

Q. And did you break into those doors?

A. Yes.

Q. Before you broke into those rooms or broke down those doors, did you say anything?

A. Yes.

Q. What did you say?

A. Knocked at each one of the doors and yelled, "Police. We have a search warrant. Open the door."

Q. Now, the testimony you just gave, did you present that testimony or give that statement in any report that you had gotten previously?

A. Not in my reports, no.

Q. This is the first time you have ever said; isn't that true?

A. Yes.

Q. And you didn't contain that in your declaration that you submitted or the U.S. Attorney submitted in support of its opposition now, did you?

A. I wasn't asked to present anything with regard to that specific address.

Q. Very well.

[59] Before you testified today, did you have a conversation with the Assistant United States Attorney regarding this hearing?

A. Yes.

Q. And did Mr. Davidson explain to you what the hearing was about?

A. Yes.

Q. And did you discuss with him an issue that was raised in the moving papers of the defendants regarding the breaking of the door of the bedrooms in the Via Magdalena residence?

A. No.

Q. Did you have any discussion regarding the Via Magdalena residence?

A. No.

Q. Did you do your own research regarding California law about breaking the door of a room that was inside a residence before coming to the hearing?

MR. DAVIDSON: Excuse me, your Honor. Could I object?

The witness testified that he said that and I would suggest that it would be improper impeachment that is being made. And I don't know how his research is relevant to this issue.

[10] THE COURT: The objection is overruled.

THE WITNESS: I believe that particular principle in California state law, anyway, with respect to knocking at the interior locks—acknowledge and notice is well-known to me—has been for several years.

BY MR. LICHTMAN:

Q. And you knew it at the time that you entered—Well, strike that.

You knew it at the time obviously that you couldn't put it in effect today.

(No response.)

You have been a police officer several years?

A. For nine years.

Q. By the way, did you knock on the doors of both bedrooms?

A. Yes.

Q. Did you make the same statement before entering any of the bedrooms?

A. Yes.

Q. Did you find items in those bedrooms?

A. Yes.

Q. Did those item appear to be contraband?

A. Yes.

Q. What did you use to break down those bedroom doors?

[61] A. Foot.

Q. Did you personally break down the doors?

A. No.

Q. Were you there present while another officer did?

A. Yes.

Q. Which officer made the statement?

A. Which statement?

Q. The statement in front of the bedroom door that you intended to enter?

A. I did.

Q. Did you do it for both bedrooms?

A. Yes.

Q. Did you make the same statement that had been previously made in front of the Price Drive residence?

A. Yes.

MR. LICHTMAN: Thank you.

THE COURT: Any other cross?

MR. ABZUG: No, your Honor.

THE COURT: Mr. Davidson.

REDIRECT EXAMINATION

BY MR. DAVIDSON:

Q. When you prepare a report on a case, do you normally—and that case involves a search warrant—how do you normally [62] incorporate that search warrant into your report?

A. Normally the report is written that on a given day a search warrant was obtained for a particular location.

And the next thing in the report would be on such and such a time and on whatever day the search warrant was executed by the officers involved.

It would be a statement to the effect that as a result of the execution of the search warrant, the following property was found inside the residence.

That would be basically the extent of the report normally with our department, and any search warrant would be attached to the crime report for additional probable cause.

Q. Now, did this crime report then contain more information about the investigation prior to the execution of a search warrant than most of your reports?

A. Way more.

Q. And when was it that you decided to put more—or you decided to put more information in the crime report?

A. After conferring with the Assistant U.S. Attorney the day after the arrest.

Q. What did he tell you?

A. He requested that I write the report in a manner in which it was written explaining everything basically, but not going into as much detail in the report.

[63] Q. Now, you testified that you would make written notes and the search warrant would be typed.

Will you tell me, were these notes or a rough draft of the search warrant?

A. Basically it was a rough draft of the search warrant.

Q. Would there be one set of handwritten notes, or was there a set of handwritten notes and then a rough draft of the search warrant, and then a typed search warrant?

A. There would be basically a rough draft of the search warrant, and then a typed search warrant.

Q. So these—whatever you say you threw away—was that what was given to the typist to type up for the search warrant?

A. Yes.

Q. Now, at the Magdalena Street address were there any people in either of the bedrooms?

A. No.

Q. Was there anyone at the Magdalena address at all?

A. No, sir, there was not.

Q. And the declaration you have submitted to this court, or you executed last week and it's been submitted to the Court, was regarding the Price Drive address?

A. Yes.

[64] MR. DAVIDSON: I have no further questions, your Honor.

MR. COSSACK: Yes, your Honor.

RECROSS-EXAMINATION

BY MR. COSSACK:

Q. Officer, just to get this straight in my head, what did was you kept a series of handwritten notes which you then turned over to a Deputy who then put it in the form of an affidavit for a search warrant.

Is that correct?

A. No.

Q. What did you do?

A. I kept a series of handwritten notes chronologically as to what occurred in this investigation, with additions every day as to what had happened the prior day, if we had done something on this particular investigation.

That was done every morning when I came to work.

Then, toward the end, I submitted the whole thing to a typist who returned it to me, both the typed copy and my handwritten copy.

Q. And then you threw away the handwritten copy?

A. After proofreading.

Q. Now, sometime thereafter you came here and had a [65] discussion with a U.S. Attorney to talk about the report, did you not?

A. Yes.

Q. This U.S. Attorney told you to create some Burbank police reports using the affidavit for the search warrant?

A. No.

Q. What did he tell you to do?

A. He requested—

I explained to him our normal procedure and explained to him how we wrote the search warrant, the investigation for the search warrant.

He requested that I be a little bit specific and include more detail than I normally would in one of our crime reports; and, in addition to that, attach the affidavit and the search warrant.

Q. Well, the only thing I understand is that when you came to see the U.S. Attorney, you had no crime report. The only thing you had was the affidavit for the search warrant.

A. That's correct.

Q. So when he asked you to create some crime reports—I don't mean some fictionally created crime reports—he asked you to create a document entitled "Crime Report"?

A. No.

[66] Q. Didn't you just testify that he asked you to put something together with less detail than in the affidavit?

A. I explained to him our normal procedure.

He requested that I be a little more specific and go into more detail than I normally would with respect to the crime reports and how they were written normally.

Q. Has it been my implication, or your implication that you intended to write something called "Crime Report" anyway, and he just gave you more instructions on how he wanted it?

A. Yes.

Q. So it is the policy of the Burbank Police Department to do what you have done, and thereafter then to write up a document entitled "Crime Report"?

A. Yes.

Q. After the affidavit for the search warrant?

A. Yes—or you may not have a crime if you do it before.

Q. You didn't know when you first started this investigation that you were going to have a crime either, did you?

A. No, sir, I did not.

Q. Now, who was this U.S. Attorney that you spoke to? Was it Bill Sayer?

[67] A. I believe so.

Q. Where did you speak with him?

A. In his office.

MR. COSSACK: Very well. I have no further questions.

THE COURT: Any further cross?

MR., LICHTMAN: No, your Honor.

MR. KAPLAN: No, your Honor.

THE COURT: Any further redirect?

MR. DAVIDSON: No, thank you. Nothing, your Honor.

THE COURT: Very well. Does the defense want to call anybody else?

(Witness excused.)

MR. LICHTMAN: Yes, your Honor. I would like to call Juan Jerro.

And I hope he is standing right outside the door.

THE COURT: All right. Go get him.

(Brief pause.)

[68] JUAN JERRO, called as a witness on behalf of defendant Del Castillo, having been first duly sworn, was examined and testified as follows:

(Brief pause.)

THE CLERK: Please be seated.

(Witness complies.)

Please state your full name, and spell your last name for the record.

THE WITNESS: My name is Juan Jerro, J-e-r-r-o.

DIRECT EXAMINATION

BY MR. LICHTMAN:

Q. Where are you employed?

A. At the Sportsman Lodge Restaurant.

Q. Directing your attention to September 21, 1981, were you present at a residence at 620 Price Drive?

A. Yes, I was.

Q. Do you recall on that evening or approximately 5:30 that evening that police officers entered that residence?

A. Yes.

Q. Let's go over the occurrence of events that occurred at that time.

Who was present in the residence at approximately about 5:30?

[69] A. It was Armando Sanchez, Pat—Patricia—Del Castillo and myself.

Q. That is Patsy Stewart?

A. Yes.

Q. Is it true—what was your purpose in being there?
Why were you in the residence?

A. I was watching the Monday night football game.

Q. Now, while you were there and when you were watching Monday night football, were you in the living room of the residence?

A. Yes, I was.

Q. Did you hear anything unusual that occurred when you were either in the back yard or the back area?

A. Unusual? What sort of—

Q. Any sort of noise, or something that perked up your attention?

A. No.

Q. When you were in the living room, was Patsy and Armando in the living room?

A. No.

Q. Where were they?

A. Either in the kitchen or somewhere out of the house—back yard. I couldn't recall.

Q. Did you hear any yelling or any noise coming from [70] the back yard?

A. Yes.

Q. And when you heard it, by the way, what did you hear as you recall?

A. I heard Pat—I heard Patricia saying "Money." I heard her call for her money.

Q. Did she seem agitated or upset?

A. Yes.

Q. Mr. Del Castillo and yourself at that time were in the living room; is that right?

A. Yes, sir.

Q. Did you both go to the sliding door to see out to the back yard?

A. I did not walk. We walked halfway from the living room to the door that leads to the back yard.

Q. Did you look out that door?

A. Yes, I did.

Q. Did Mr. Castillo look out of the door with you?

A. Yes.

Q. What did you do?

A. We saw several police officers. I couldn't see how many.

Q. Was Mr. Sanchez and Mrs. Stewart out in the back yard when you saw the police officers?

[71] A. No, sir.

Q. Where were they?

A. I really don't know. I don't know where they were. They were outside the house.

Q. When you looked out, did you see any guns?

A. As I recall, I saw two or three maybe.

Q. Were these either shotguns or rifles?

A. I saw a rifle and I saw a handgun, also.

Q. Now, after you and Mr. Del Castillo saw what occurred in the back yard, what did you and Mr. Del Castillo do?

A. I sat down for one. I sat down on the couch.

Q. This was in the living room?

A. Yes.

Q. Did Mr. Del Castillo come back to the living room at that time with you and did he speak with you in Spanish?

A. Yes, we did.

Q. Did he speak in Spanish?

A. Yes, he did.

Q. What was your tone of voice? Was it loud—was it soft—was it normal?

A. Yes.

Q. What was Mr. Del Castillo's tone of voice?

A. The same.

[72] Q. Did you then hear some noise coming from the front door?

A. Yes.

Q. And what did you hear?

A. Police officers identifying themselves.

Q. And after that occurred, did Mr. Del Castillo do anything?

A. Mr. Del Castillo went to open the door.

Q. Did he say anything?

A. He said that he was going to open the door for the police officers.

Q. How many times did he say that?

A. He said that several times.

Q. Did he say it in a low tone or a loud tone?

A. I heard it very clear when they were outside, but he said it quite loud, yes.

Q. And approximately how far from the front door was he at the time he said that?

A. I would say that he was ten feet away—15 feet away. I couldn't see.

Q. And what did he say?

A. He said, "Officers, I'm going to open the door."

Q. After he said that, did the officers then break down the door?

[73] A. I heard a noise, a loud noise on the door.

Q. At the time you heard it, were you in the living room? Is that right?

A. Yes.

Q. And did you then hear the officers enter the residence?

A. Yes. I heard footsteps and talking to each other.

Q. From the time that you first heard the officers knock on the front door to the time that they entered the residence, how many seconds was that?

A. Five, ten seconds approximately.

MR. LICHTMAN: Nothing further, your Honor.

THE COURT: Any other defendants have any examination?

MR. KAPLAN: No, your Honor.

MR. ABZUG: No, your Honor.

THE COURT: Mr. Davidson?

CROSS-EXAMINATION

BY MR. DAVIDSON:

Q. What time did this occur?

A. I would say 5:30.

Q. This was a Monday?

A. Monday night, yes, sir.

Q. What were you doing there?

[74] A. I was invited to have dinner. We were cooking out in the back yard—sort of a barbecue, and we were going to watch the football game that night.

Q. Now, did you see Patsy and Armando in the back yard?

A. No, I did not.

Q. You never saw them in the back yard?

A. No.

Q. When had you seen them before that?

A. In the living room. They were just awhile before all of this happened—in the house like back and forth, and so on.

Q. And did you hear anyone yell to them in the back yard?

A. Yes.

Q. Did you hear what anybody—Did you hear what was yelled to them?

A. No. I just heard a noise like somebody was screaming from the back yard.

Q. You heard the officers knock on the front door?

A. No, not as I recall.

Q. You didn't hear them knock on the front door?

A. They did. I really don't remember if they did knock or not.

MR. LICHTMAN: Your Honor, can we be more specific [75] as to what the question refers to?

Does it refer to prior to the time they knocked the door down? Is that the knock we are referring to, or some other knock?

THE COURT: All right. Be more specific.

BY MR. DAVIDSON:

Q. Did you ever hear—

Taken from the time that—

In between the time that Patsy and Armando left and the time that you heard anybody knock on the front door.

A. I heard them identifying themselves as police officers, "Open up."

And that is when Mr. Del Castillo got up and went to open the door, and that is when he said, "I'm going to open the door for the officers outside."

Q. And he said that twice?

A. Yes.

Q. And is it both times and then the door was broken open?

A. Yes.

Q. Did the officers say they had a search warrant?

A. Not to me, they didn't. They didn't tell me.

Q. I am sorry.

When someone on the other side of the door said that [76] they were police officers, "Open up"—

A. Right.

Q. —did they say they had a search warrant?

A. I did not hear that.

Q. You did not hear that?

A. No, I did not.

MR. DAVIDSON: I have no further questions, your Honor.

THE COURT: Any further direct?

MR. LICHTMAN: No, your Honor.

THE COURT: Any further cross?

MR. DAVIDSON: No, your Honor.

THE COURT: You may step down.

Anybody else?

MR. LICHTMAN: No, your Honor.

MR. KAPLAN: No, your Honor.

MR. ABZUG: No, your Honor.

MR. COSSACK: No, your Honor.

THE COURT: Mr. Davidson, do you want to call anybody?

MR. DAVIDSON: No, your Honor.

THE COURT: That closes the evidentiary portion of these motions.

Do you want to argue?

[77] MR. KAPLAN: Just a few comments.

THE COURT: Don't repeat what is in your papers, or any of the papers.

MR. KAPLAN: I just want to call the Court's attention to a couple of items.

The Government refers to, on page 12 of its response, line 15, that the detention would be reasonable of somebody in a residence, and cites *Michigan v. Summers*.

And I just want to call the Court's attention to the fact that I don't think that would be applicable in my situation, your Honor, because, as the Court just heard, Leon was not arrested, was detained outside; and the citation I don't think would be proper.

The other citation the Government referred to is on page 8, line 13, *United States v. Wong*, where he made reference to this woman who was giving information for her own safety.

In reading the case of *U.S. v. Wong*, I want to point out, your Honor, that the factual situation is entirely different. That situation dealt with two specific crimes—one an assault with a deadly weapon, and the second offense as a murder.

The informant has testified, or rather the affidavit resulted in her observing machine guns and grenades in the accused's apartment, and went into a lot of other factual situations which was substantiated and corroborated.

[78] I don't think that also would be applicable because that wasn't the basic holding of the case.

And I just want to point those two things out to the Court.

To summarize in just about 90 seconds, your Honor, there is no place in the warrant, in this particular warrant that specifically articulates any facts stating that there was narcotics to be found at the residence of Leon.

And I would submit to the Court that the warrant is completely faulty with respect to the search of the Leon residence on Sunset Canyon.

The facts deal with prior arrests, the client prosecution; a statement that he was involved.

We don't know the basis of that statement. It was made 17 months prior.

An informant who had allegedly told a police officer who told another one that he had some quaaludes or pills at his residence at a time that we don't know when; to a Laguna Beach address, where we don't know what the facts are.

And there was not one fact listed by anyone, any informant—reliable or unreliable—that at the Sunset Canyon address there would be narcotics.

And I stress, I urge that point most strenuously, your Honor."

THE COURT: All right. Who is next?

[79] MR. ABZUG: Thank you, your Honor.

THE COURT: Yes, Mr. Abzug.

MR. ABZUG: Your Honor, I'd like to direct my comments to the sufficiency of the warrant that was executed for the residence at 620 Price Drive.

I know what was read in my moving papers, but I'd like to reply to the Government's response.

The Government concedes, as it must, the only direct evidence, and the affidavit contains, as it must, the only direct evidence that the affidavit contains of narcotics activity at the police price, rather than being furnished by the informant whose information was stale and not timely, and whose reliability was not sufficiently alleged under the Aguilar test—what they do attempt to say to save the warrant is they try to point to facts they say sufficiently corroborate the informant's reliability.

I submit to the Court the fact that these facts the Government points to in the moving papers are insufficient in that the facts could be obtained or alleged by an informant who was not involved or not in a position to know of illegal narcotics activity of the 620 Price Drive residence, or those facts had nothing to do with narcotics activity at the 620 Price Drive residence.

One of the informants said that my client, Armando Sanchez, and Patsy Stewart lived at that residence, and that [80] fact was corroborated by independent police investigation.

Well, the fact that they may have lived at that residence is a fact that could have been secured quite easily by the informant.

They pointed to the fact that Patsy Stewart owned a Dodge vehicle, and that was corroborated; and Armando Sanchez owned a Corvette, and again that was corroborated by independent police investigation.

They don't indicate necessarily that the informant is in a position to know of illegal narcotics activity in the Price Drive residence.

And the fourth fact was corroborated by independent police investigation, that the informant's allegations that the narcotics were maintained at a stash pad on the Via Magdalena was corroborated by field investigation.

Again, that fact has nothing to do with the Price Drive residence.

The only other argument that the Government raises with respect to trying to save the warrant is that other probable cause supplied by the affiant saves the warrant in terms of showing that on September 21st, 1981, there would be evidence of narcotics in the residence.

And here, again, your Honor, I think it is grossly improper to approve probable cause.

I would indicate that my client was arrested for [81] possession of marijuana. They do not indicate, however, that that case was dismissed in Florida in the federal court on July 15th, 1971; and the mere fact that an arrest for marijuana two years before the search, I would submit is utterly of no significance in applying probable cause.

It indicates, secondly, that a search of my client's bags at the Miami Airport on September 19th, but again that search didn't disclose anything of significance with respect to what was to be found at the Price Drive address, and the search disclosed neither the presence of quaaludes nor cocaine, which was what they anticipated and expected to find at the Price Drive address.

And, finally, they allude to the fact that the affiant supplied information in his affidavit that on four occasions over a month he saw the people exiting the Price Drive residence with paper bags or with objects.

I submit to the Court that this has utterly no significance. First of all, there is no indication that the affiant knew what was in the paper bags; the objects that are coming out of the apartment are all different—not of a regular size or shape; that the affiant said was customarily used by people in the cocaine trade; and, indeed, the affiant doesn't

attach too much significance to the affidavit to the comings and goings of these people themselves.

So, on balance, your Honor, what I see here is a [82] series of misinformation that is put in the affidavit by the affiant in an effort to try to show probable cause that there would be narcotics on September 21st; but, under the prevailing legal standards, I think they have utterly failed to show this.

And I think that the warrant should be suppressed.

So the only other miscellaneous thing I think is the breadth of the warrant itself, and again I won't repeat what is in the papers, but just emphasize that the warrant as drafted permitted the officers to get any articles of personal property tending to establish, which in their judgment tended to establish document sales of cocaine or methaqualudes—any articles of personal property, which in the officers' judgment tended to establish the conspiracy to sell these articles of narcotics, and tended to establish the identity, in the officer's judgment, to establish the identity of the people in control of the premises searched.

The whole purpose for the warrant, in submitting the warrant to judicial examination is to try to limit what the officers can see to a limited extent.

Under the warrant, as presently drafted, the officer basically had carte blanche to seize anything he wanted to.

THE COURT: Mr. Abzug, aren't you repeating what [83] is in your papers?

MR. ABZUG: Yes, your Honor.

And I will submit it on the papers.

THE COURT: Anybody else?

MR. COSSACK: Your Honor, I will be brief.

I think this warrant has to stand or fall on what this unknown, untested, unreliable informant told us.

There has been no corroboration of the informant. There was a long investigation in which they find the following items.

That these people know each other; that at some time they leave the house and go in a car to other places, and sometimes carry a little bag with them and sometimes don't.

At no time was there any allegation, it seems to me, that if the Court also is going to find them in possession of narcotics, they don't do a search of them at the airport.

There is no corroboration element.

We know allegedly there was an informant who told them something six months earlier.

If they are going to find them in possession of narcotics, they don't after a search of the airport.

There is no corroboration here.

We know that allegedly there was an informant who told them something six months earlier. I have yet to [84] find a court that will sustain information that was given six months earlier. I have yet to find a court that says information that is six months old is not sustained.

MR. LICHTMAN: Just a few comments, your Honor, with out repeating the arguments of counsel and the arguments submitted in our papers.

Regarding the execution of the warrant—and we have had testimony about that today—as the Court is aware under the California knock-notice rule, the police are required to give sufficient warning before breaking and entering into a residence. That must indicate to the occupants sufficient time in order to respond.

I believe the evidence has shown that there was not a sufficient time given the occupants.

First of all, under *People v. Berkeley* cited in our papers, when an occupant offers to open the door and is not given the opportunity to do so, that is grounds to quash the warrant itself.

I believe the testimony so indicates.

Furthermore, the occupants in the house were not given a reasonable time to react to the request or to the statements made by the officers at the front door.

Officer Rombach stated he felt or feared that there was a destruction of contraband and based totally on the fact that he heard talking in the residence and he said [85] there was some running.

There was no other indication that there was contraband being destroyed or that the occupants were arming themselves.

Under the relevant California cases, more is required to sustain a warrant.

Many police will justify entering a house on the belief that the occupants are destroying contraband, but the cases say that you simply can't do that unless you have reason to believe, in fact, that the contraband is being destroyed, or that the occupants are arming themselves.

In this case, there simply wasn't that type of information available to the officers.

Mr. Jerro testified that it was only about five or seven seconds from the time the officer first stated his presence in front—at the front door—and the time they barged in the house.

As we have cited in our motion, that is not a sufficient amount of time to give the occupants an opportunity.

Also, there are officers at the rear of the residence, and these officers, as Rombach knew, had people under submission.

There was no indication that anything was happening to barge in but, unfortunately, they did.

I would submit the exclusion of the warrant being [86] in violation of the California knock-notice rule and the Fourth Amendment rule, that the search and the items seized during the search of the 620 Price Drive residence should be suppressed.

I would like to address very briefly the standing issue. I would submit to the Court, as was argued in the papers, that both California law and federal law should apply to the question of standing. Under California law I don't think there would be any dispute that, under the vicarious standing doctrine every defendant who would proceed would have standing.

I would submit to the Court that if the Court does not believe California law applies as to standing, that under federal law we would have a contrary result if we were to adopt the Government's position that, under federal law, that standing would not apply to Mr. Del Castillo.

I say that because of this, your Honor. The Government would have to argue that state law did not apply to the question of standing; and, number two, that on the question

of federal law, Mr. Del Castillo would not have an expectation of privacy, yet, at a trial of this proceeding, the Government would have to argue that Mr. Del Castillo would not have an expectation of privacy as to any of the residences.

Therefore, the Government would have to argue, [87] at the trial of this proceeding, that Mr. Del Castillo had dominion and control over these very items that were found and seized at this very residence. And it seems that Mr. Del Castillo, under those arguments in the case, that those arguments are not consistent.

Therefore, I would urge the Court to find standing for Mr. Del Castillo under California and federal law, and find that the warrant was legally and sufficient based on the arguments submitted by cocounsel and contained in the papers.

Thank you.

THE COURT: All right. Mr. Davidson.

MR. DAVIDSON: Let me start with the argument of Mr. Lichtman.

With respect to standing, your Honor, Mr. Lichtman's argument may sound nice, but I believe authorizes the same ones rejected by the Supreme Court on recent decisions of standing.

And, with respect to his argument as to Cella, that has been offered and I think, in his generally correct citation of the law and his standing argument, he says that his standing rule in the Ninth Circuit is well used federal standing, and he cites no case, and I am aware of no case that overrules Cella.

I would suggest that he is the best example for [88] standing because I suggest Mr. Del Castillo has shown no standing anywhere here.

He was merely a guest at the Price residence. I think he was similar to the passenger in Rakas, and certainly he has shown no standing, and certainly no one has shown any standing in the Via Magdalena address.

I believe Mrs. Stewart's affidavit is a conclusory one—I had a reasonable expectation for privacy—is simply not sufficient.

As to the knock-and-notice, I would suggest that there might be some sort of a credible contest, but I think it is more reasonable that the officers were outside and heard who was yelling, and they know what they were yelling. But Mr. Jerro, who was inside, maybe didn't hear everything.

Additionally, he says that he two times told the officers that he was going to open the door, and the door was broken down. And just finally, I believe, that Mr. Lichtman has misconstrued the declaration of Officer Rombach.

He said from hearing the yelling from the back, he got the impression that the people in the back were not under control; that the officer in the back had to yell twice, and he said that they had to use profanity, and he felt the people were not subdued and it was a dangerous situation.

And, finally, your Honor, I read it last week and [89] I might have forgotten, but my memory of *Michigan v. Summers* was that someone was leaving the place to be searched. But, in any event, we have more than *Michigan v. Summers*.

In this case, we have specific evidence relating to Mr. Leon. We have glassy eyes; someone who can't hold himself erect correctly, and someone who has a white powder around his nose; and the trained narcotics officer comes to the conclusion he has just taken cocaine—just committed a crime.

I would respectfully request it is correct. I hope that just about everything else is alluded to in my papers, and, if so, I'll sit down.

THE COURT: I do not have any questions.

All right. There are a number of motions here to suppress. I have reviewed the papers and listened to the testimony, and I am ready to rule right now. So get your pencils out.

I am going to dispose of the collateral issues first, the ones not too difficult.

First of all, I seriously doubt whether the California knock-notice statute applies to this case; even assuming it does, I find from the record that the statute was not violated.

With reference to the overbreadth argument, in a case like this with respect to conspiracy, I don't think the warrant on conspiracy is overbroad, so I [90] deny that argument.

With respect to the warrant itself, I read it several times, considered the affidavits and the other factors involved. I just cannot find this warrant sufficient for a showing of probable cause.

I think it is somewhere between Spinelli and Valenzuela, and probably leans toward Spinelli.

There is no question of the reliability and credibility of the informant as not being established.

Some details given tended to corroborate, maybe, the reliability of his information about the previous transaction, but if it is not a stale transaction, it comes awfully close to it; and all the other material I think is as consistent with innocence as it is with guilt.

The material referring to the other information with respect to the defendant Leon, I think is about in the same category.

If he was the one the information came from, the Police Department; but again that is information from some informant about which we know nothing.

So I just do not think this affidavit can withstand the test. I find, then, that there is no probable cause in this case for the issuance of the search warrant, which gets me to the next question of standing.

I think it is pretty clear in this case, in this [91] Circuit, that standing is determined by federal law. I do not believe *U.S. v. Cella* has been overruled; in fact, I think it has been confirmed in *U.S. v. Portilla*, 633 Fed. 2d. 1313, 1980, which confirms that the standing rule still is to be determined by federal standards. First, with respect to I think the search of 620 Price Drive, those people who I think have standing to contest validity of that search because they have a legitimate expectation of privacy at 620 Price Drive, would be the defendants Sanchez and Stewart who have established, I think, without contradiction, that that is their primary residence.

With respect to the search at 716 South Sunset Canyon, defendant Leon has established that that is his residence; that he is the owner of that place. So I suppress the fruits of that search, including the search of his person.

There may have been probable cause to arrest him for some state law possession of cocaine or something like that, but that was directly the result of his being detained in the course of the execution of the search warrant. So he was detained because the search warrant was being executed, and all of these other matters flowed from that detention.

So he is entitled to suppress the search of the Sunset Canyon residence.

With respect to the condominium at Via Magdalena, there is no evidence of any possessory interest. The only [92] thing that comes close is the declaration of Patsy Ann Stewart that declares that she paid the utility bills at 7902 Via Magdalena, and had paid them for the month of September.

I don't think that is sufficient to establish a legitimate expectation of privacy.

For several years I paid the dormitory fees for my children, and I do not think I have any expectation of privacy in their dormitory rooms. So, on that standing alone, that does not give rise to an expectation of privacy.

So I find no one has standing to contest the search of 7902 Via Magdalena. So nothing uncovered there is entitled to be suppressed by these defendants.

With respect to the safe deposit box, I think that flows directly when the search of the Price Drive home, it is the direct fruit of that home—at least the key was—and, for that reason, I do not think there is any attenuation or anything like that; so, for that reason, the results of that search should be suppressed.

So, whatever was discovered in the safe deposit box is ordered suppressed.

With respect to the automobiles, I do not know what the state of the record is. It is almost hard to tell what was searched, I would say first.

Is this correct that the Government does not intend to introduce any evidence with respect to the search [93] of

Sanchez's car? Was that the representation made in the papers?

MR. DAVIDSON: If I may have a moment, your Honor.

THE COURT: Yes.

(Mr. Davidson conferring with his case agent.)

MR. DAVIDSON: That was a correct representation, your Honor.

THE COURT: You intend to introduce evidence as a result of searches of other cars, do you not?

MR. DAVIDSON: Yes, your Honor, as to—

THE COURT: Tell me what that is.

MR. DAVIDSON: As to Mr. Del Castillo's car, there was some residue of marijuana, I believe in the trunk.

THE COURT: All right. Tell me what else.

MR. DAVIDSON: In Miss Stewart's car, there were two garage door opener transmitter devices, and one of them was the garage door opener for the Via Magdalena address.

And as to Mr. Leon's car, if I could have just one moment.

(Mr. Davidson and the agent confer further.)

There would be only two cars, your Honor—Mr. Del Castillo's car and Miss Stewart's car.

THE COURT: With respect to the fruits of those searches, I am going to suppress the results of the search [94] because I think it's been directly—no attenuation, but again only with respect to the persons who asserted an interest in the automobiles; namely, Don Castillo in his own car, and Stewart in her car.

Did I leave anything out?

MR. ABZUG: Your Honor, the only thing I want to clear up for the record, as I indicated in my motion, I am also moving to suppress as a result of the arrest of Mr. Sanchez the statement he gave subsequently to the DEA as a fruit of the unlawful search.

THE COURT: Yes. That statement to me, I don't have any exception to that, so that is suppressed.

MR. ABZUG: Very well, your Honor. Thank you.

MR. COSSACK: I would ask suppression of the statement that Miss Stewart gave also, your Honor.

THE COURT: Well, Mr. Davidson, given the ruling on the warrant, do you know of any exception to suppression of the statement? I cannot think of any.

MR. DAVIDSON: Well, let me put it this way, you know.

I know of no difference in the facts between Mr. Sanchez and Miss Stewart.

THE COURT: Then I will also suppress the statement given by Miss Stewart in execution of the warrant.

MR. LICHTMAN: Your Honor, I think there was a [95] search made of some trash cans.

THE COURT: I could not tell whether anything of value to the Government was discovered there or not.

MR. DAVIDSON: I told defense counsel in writing that I wouldn't use that.

THE COURT: All right. Now, in view of those rulings, Mr. Davidson, first, are you ready to go to trial?

MR. DAVIDSON: Well, yes and no.

I guess the answer is really no. I would like to be able to look this all over and I know that we would want to look into the possibility of appealing or not.

THE COURT: I understand that.

Let me put it this way. I will tell everybody I have a case I am still trying from last week. I expect to finish it sometime tomorrow, even maybe by noon.

Can you have some decision made by, say—(Court and clerk conferring.)

What about coming back about 3 o'clock tomorrow.

MR. DAVIDSON: I'd be more than happy to, your Honor. Sure, I will be far better educated. I am not sure I will have—

THE COURT: You are not sure you will have a definitive answer?

MR. DAVIDSON: No, your Honor. The decision to appeal is made in Washington.

[96] THE COURT: Come in and say that you need more time so that you can all be back—

Just a minute.

(Court and clerk conferring further.)

The clerk says that we have a jury request here, and we have to know about that. We will postpone that until Wednesday, at the earliest.

Are any of you going to ask for a jury trial? Do you know that?

MR. LICHTMAN: We have all been talking about the possibility of either a court trial, or for a stipulation of facts, or a stipulation of some facts and a court trial on the remaining undisputed facts.

We have not made a resolution of that.

MR. COSSACK: Your Honor, I might say that the stipulation, in light of the Court's ruling, I don't think a stipulated fact would be in my client's interests; however, a court trial would be.

THE COURT: Does anybody here think he wants a jury trial, assuming that the Government goes ahead with your clients?

MR. ABZUG: I'd like to confer with my client.

THE COURT: Can you let the clerk know? And I understand that is without knowing what the Government is going [97] to do, but to the best of your ability if you could project.

MR. DAVIDSON: Your Honor, I can say one thing. I don't know exactly what I will be saying at 3 o'clock tomorrow, but my educated guess is that the Government will be asking for a significant amount of time in the area of two, three weeks to consider the possibility of an appeal; and, at least I believe it is very likely what we'll be deciding tomorrow, so I don't think the Government is going to want to go to trial this week. It is the sort of thing we will have to wait out and see.

THE COURT: It is a good case to appeal.

MR. KAPLAN: I was going to make a suggestion that we put it over to the first week of February and resolve all of these issues, instead of coming back on a daily basis.

THE COURT: It won't be a daily basis. But come back tomorrow so that you know where we stand in advance, and if your decision is that you are going to go back to Washington to seek authority to appeal, I think we ought to put it over for some time.

MR. LICHTMAN: When we come back, should we have our clients with us? Is that necessary?

THE COURT: I think you should, because it is possible that you might be going to trial. I do not think it is likely, but you should have your clients with you.

MR. KAPLAN: This will be at 3:00 p.m. tomorrow [98] afternoon?

THE COURT: Yes. Thank you, very much.
The next matter.

(Proceedings in the foregoing matter were concluded at 4:45 p.m.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 81-907-AWT

HONORABLE A. WALLACE TASHIMA, JUDGE PRESIDING

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ALBERTO ANTONIO LEON; ARMANDO LAZARO SANCHEZ;
PATSY ANN STEWART; RICARDO ALBERT DEL CASTILLO,
DEFENDANTS.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Los Angeles, California
Tuesday, January 12, 1982

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Official Reporter
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[102]LOS ANGELES, CALIFORNIA, TUESDAY, JANUARY 12, 1982; 3:02 P.M.

THE COURT: Call our 3 o'clock matter.

THE CLERK: Yes, your Honor.

Item No. 2, CR 81-907-AWT, United States of America v. Alberto A. Leon, Armando Lazaro Sanchez, Patsy Ann Stewart and Ricardo Albert Del Castillo.

Appearances, Counsel.

MR. DAVIDSON: Good afternoon, your honor.

Anstruther Davidson for the United States of America.

MR. KAPLAN: Norman Kaplan with Mr. Leon, who is present, your Honor.

MR. COSSACK: Good afternoon, your Honor. Roger Cossack with Patsy Ann Stewart, who is present.

MR. VODNOY: Good afternoon, your Honor. Joseph Vodnoy with Armando Lazaro Sanchez, who is present.

MR. LICHTMAN: Good afternoon, your Honor. Jay Lichtman, who is present with Mr. Ricardo Del Castillo.

THE COURT: I understand the Government is going to ask for some time to appeal. Is that right?

MR. DAVIDSON: Yes, your Honor.

THE COURT: Go ahead.

MR. DAVIDSON: Your Honor, the Government—I can't say for sure that we will appeal, but I believe it is [103] likely enough.

THE COURT: Well, you have asked for authority. Is that right?

MR. DAVIDSON: No, we haven't.

I talked to the people in Washington. We have to make a request in writing requesting authority to.

THE COURT: You have not made a formal request in writing to do so?

MR. DAVIDSON: No, not from the Solicitor General.

In my opinion it takes in the matter of a week, two weeks, or three weeks.

THE COURT: All right.

MR. DAVIDSON: I would request that we have 30 days within which to appeal.

THE COURT: Very well.

MR. DAVIDSON: I believe we have—

I request a continuance of 30 days of the trial. Now, dealing with the Speedy Trial Act problem, there are two things: One, I believe we have about 40 or so days left to act.

The Court has already excluded the time from November the 12th until yesterday due to the illness and unavailability of Mr. Vodnoy.

I don't think that the Court specifically excluded it, but I would ask the Court to exclude it and will present [104] an order with respect to the time in October between the filing and ruling upon the discovery motions.

The defendants asked for the identity of the informant and—

THE COURT: The first motion, I think, is that this case was filed on October 28th, and that would be a motion to disclose the name of the informant and several similar motions, and a discovery motion was filed two days later.

So the first such motion was filed on the 28th and it was determined on November 12th.

So I think that time is excludable under the Speedy Trial Act.

Does any defendant take exception to that?

MR. COSSACK: No, your Honor.

THE COURT: That is 3161(b)(1)(f)—delay resulting from any pretrial motions.

Well, I find that the time is substantially excludable under (b)(1)(f).

So if you add that to, what is it—two months—is that right from the—

MR. DAVIDSON: Well, the way I was figuring it, your Honor, is that since you excluded from November 12th—

The original day that the Act was to expire, the 70 days was to expire was December 11th.

THE COURT: All right.

[105] MR. DAVIDSON: We are now excluding what you just mentioned. We are on November 13th, as I view it.

THE COURT: All right.

MR. DAVIDSON: So we have got what, 29 days or so there, plus the 14 days that we just obtained there, which, in my view, would give us 30 days.

Now, this is an exclusion for an interlocutory appeal.

As one defense counsel pointed out, however, I have not filed an appeal. For a lot of reasons I would like not to file the notice of appeal at this time if I can avoid it because—

THE COURT: I do not think that can apply, at least until you decide to appeal.

MR. DAVIDSON: I think I must agree with the Court on that.

THE COURT: Well, I find that earlier period excludable under that subsection just cited.

I will give you your continuance, but I think you will know before a month, won't you, whether or not you are going to appeal?

MR. DAVIDSON: We should know, yes, your Honor.

I certainly would advise the Court and all counsel as soon as I find out.

THE COURT: All right. Does that mean that if you [106] do not appeal you are going to be prepared?

Well, first of all, let's pick a date for that. Thirty days would be what? Today is the 12th?

THE CLERK: Yes, your Honor.

MR. DAVIDSON: Yes, your Honor, today is the 12th.

THE COURT: Well, Monday is a holiday. What about Tuesday, the 16th? Do we have enough time to take it on then?

MR. DAVIDSON: The 16th would be a month.

THE COURT: That is a month.

MR. DAVIDSON: Yes, that would be fine.

THE COURT: And you estimate this to be what, about four days?

MR. DAVIDSON: Yes, your Honor.

(Court and clerk conferring.)

THE COURT: So I will give you a continuance based on excludable time to February 16, 1982, at 9:30 a.m.

Now, if there is any need to come in earlier to decide what to do in case you don't appeal?

MR. DAVIDSON: I think there probably would be, your Honor, because, as I view it now, I'm very afraid there would have to be some severances if we go to trial.

THE COURT: Will you know a week before whether you are going to appeal? In other words, by the 8th of February?

MR. DAVIDSON: I hope so, your Honor. I would [107] suggest setting a status conference at that time.

THE COURT: Yes, why not set a status conference, and if defense counsel want to, you can file a waiver and your clients won't have to be here for purposes of a status conference, and if you choose to file a waiver, you may do so.

All right, then. Let's set a status conference for Monday, February 8th, at 10:00 a.m. in this case. Is that all right?

THE CLERK: Yes, that will be fine, your Honor.

THE COURT: Now, assuming the Government has filed a notice of appeal by that date, then the status conference will be canceled. That is understood, right?

And let us know, Mr. Davidson, if you can, before the 8th what you plan to do.

MR. DAVIDSON: I will, your Honor.

Your Honor, may I just raise one point. I certainly don't want to relitigate anything.

THE COURT: Raise anything you want.

MR. DAVIDSON: What was that?

THE COURT: Raise anything you want.

MR. DAVIDSON: I cited and mentioned briefly the Fifth Circuit Williams case.

THE COURT: Yes.

MR. DAVIDSON: Certainly, I assume the Court did not want to blaze what someone would call a new trail.

[108] I would ask, however, if either the Court would make a finding with respect to the good faith issue that the officers acted in good faith, or at least a finding, which I think is amply supported by the record on the absence of any bad faith on the part of the policemen executing the warrant.

THE COURT: First of all, let me ask you this: You recall I made some statements generally yesterday on the record

when I ruled on the motion. I guess to the extent findings are useful, those would be considered findings.

I don't intend to do anything in writing. I have not requested any party to submit a proposed finding, unless somebody thinks it is necessary.

On the issue of good faith, obviously that is not the law of the Circuit, and I am not going to apply that law.

I will say certainly in my view, there is not any question about good faith. He went to a Superior Court judge and got a warrant; obviously laid a meticulous trail. Had surveilled for a long period of time, and I believe his testimony—and I think he said he consulted with three Deputy District Attorneys before proceeding himself, and I certainly have no doubt about the fact that that is true.

MR. DAVIDSON: I understand, your Honor. Thank you.

THE COURT: Anything else?

[109] MR. DAVIDSON: Nothing from the Government.

THE COURT: You are going to prepare an order for me on the continuance?

MR. DAVIDSON: Yes, I will. May I have one order as to the exclusion in—

THE COURT: Continue it to that date, a status conference the week before if no notice is filed, and just find the additional time excludable.

All right?

MR. LICHTMAN: Your Honor, there is one comment I'd like to make so as not to waive any Speedy Trial rights for my client.

THE COURT: Yes.

MR. LICHTMAN: First of all, I haven't done the mathematics to figure out the 70 days.

I would like to say first of all that we are, as of today, prepared to proceed to trial.

THE COURT: All right.

MR. LICHTMAN: The second point is that if the Government does not file a notice of appeal or does not, in fact, go to trial within the 70 days—and I haven't figured that out either—of course, without wanting to waive the Speedy Trial, I feel that might be a waiver of the Speedy Trial.

THE COURT: It might be.

[110] MR. LICHTMAN: And the third point is this—and perhaps I should point out this point—another novel point, because of the Court's findings regarding Mr. Del Castillo's standing, I'm not sure that the Government's appeal in this case would affect Mr. Del Castillo.

If so—and I'm not sure what the answer to this is—the excludable time for the interlocutory appeal that does not affect one defendant may be a violation of that defendant's Speedy Trial rights.

I have done some research this morning, but there doesn't seem to be the case law.

THE COURT: That is not my view, and if you want to move for severance, you may do that. I am not going to make an advisory ruling on what will happen in the future to violate the Speedy Trial Act.

My view is as long as the case is unsevered and there is an interlocutory appeal, that will totally toll the Act.

Certainly I agree with the Government, as of now, there is plenty of time without looking at interlocutory appeal provisions.

But, even assuming the Government does appeal and at that time you feel you will be prejudiced, I think you ought to make a motion to sever at that time so you won't be waiving any of your rights. I think obviously that is one of [111] your alternatives.

But, beyond that, I think it is academic because I don't know if the Government is going to appeal or not. That is the reason I would like to have the status conference a week before because, if the Government does not then, I think we should all be prepared to go ahead. All right?

MR. DAVIDSON: Thank you.

THE COURT: Anything else?

MR. LICHTMAN: No.

THE COURT: All right.

(The proceedings in the foregoing matter were concluded at 3:31 p.m.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CR 81-907-AWT

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ALBERTO ANTONIO LEON; ARMANDO LAZARO SANCHEZ;
PATSY ANN STEWART; RICHARDO ALBERT DEL CASTILLO,
DEFENDANTS.

REPORTER'S CERTIFICATE

I, M. LENOIR EDDY, CSR, do hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing pages comprise a true and correct transcript of the proceedings had in the above-entitled cause and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this ____ day of March, 1982.

/s/

Official Reporter

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL

No. 81-907-AWT

THE HONORABLE A. WALLACE TASHIMA, JUDGE PRESIDING

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ALBERTO A. LEON, ARMANDO L. SANCHEZ, PATSY ANN
STEWART, AND RICARDO ALBERT DEL CASTILLO,
DEFENDANTS.

REPORTER'S TRANSCRIPT

Los Angeles, California
Monday, February 8, 1982

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[3] LOS ANGELES, CALIFORNIA; MONDAY, FEBRUARY 8, 1982; 10 A.M.

THE CLERK: Item 11. GR-81-907-AWT. United States of America versus Alberto A. Leon, Armando L. Sanchez, Patsy Ann Stewart, Ricardo Albert Del Castillo.

Counsel, announce your appearances, please.

MR. DAVIDSON: Anstruther Davidson for the Government.

MR. KAPLAN: Norman Kaplan for the Defendant Leon who is not present but there is a waiver on right, Your Honor.

MR. ABZUG: Michael Abzug appearing on behalf of Armando Sanchez who is present and ready to proceed.

MR. COSSACK: Roger Cossack for Patsy Stewart who is present in court.

MR. LICHTMAN: Jay Lichtman for Mr. Del Castillo who is also present and ready to proceed.

THE COURT: Today was originally scheduled as a status conference to see where we were going, and I think we now have a motion from the defendant—

MR. DAVIDSON: From the Government.

THE COURT:—for a stay.

MR. DAVIDSON: No, not exactly. If I can [4] speak first, I think I can expedite the proceedings, Your Honor.

THE COURT: All right.

MR. DAVIDSON: First we do—well, I filed a motion to reconsider the case based upon the Supreme Court's grant of certiorari in the Gates case. I had two requests of the Court in my papers. One, the most efficient looking on the face of it, ignoring the Speedy Trial Act for just one moment, would be to take the motion under submission until at least about March, when we would know whether the Gates case is going to make it on at least the oral argument calendar of this term. This would save what could possibly be a very unnecessary appeal.

However, putting the Speedy Trial Act back into that, I have very significant problems with the Speedy Trial Act because it would have to go under the—an exclusion of time would have to be under the interests of justice exception. So in my papers I sort of hedged, saying that the Gov-

ernment at least would want to see what counsel thinks of that disposition of this matter in light of the Speedy Trial Act.

I'm told by I think all but Mr. Lichtman, I'm sure he probably joins in it, that I think they don't like that disposition and are opposed to it. Under that, [5] unless the Court is very strongly desirous to do it, the Government would not ask to take the—that the Court take this matter under lengthy submission and find the time excludable under the interest of justice exception to the Speedy Trial Act.

The alternative, and I won't present argument on it, I'll just say that we have filed the motion and would like a ruling on it, we—I realize I've shown the Court a case which goes the way of the defense. The only thing I would say is that our case here was close, I would suggest. The Illinois Supreme Court dealt with a case strikingly similar, and concededly it's a guess, but I would think that the United States Supreme Court would be wasting its very precious time to be taking the Gates case merely to affirm it, and that apparently at least four Justices have grave doubts to the propriety of the Gates case.

That's all the argument I would have on the motion itself. And if the motion is denied, Your Honor, just for the other purpose we are here, that is the status conference, we will be filing a notice of appeal, probably tomorrow morning.

THE COURT: You have your authorization, right?

MR. DAVIDSON: I have an authorization to [6] file a notice of appeal and will very likely get the ultimate, final authorization from the Solicitor General, yes.

THE COURT: Okay. The defendants? I assume you are all in agreement as to what to do. Can we not hear from everybody and can we have one or two summarize your position here on the Government's motion?

MR. COSSACK: May I ask Your Honor one question? Is Your Honor intending to grant the motion for reconsideration, because, if not, I think it would do away with my argument at least about whether or not the Gates case is even applicable to our case, which I'm prepared to argue it's not even close to our case.

THE COURT: I'm not sure I agree with you on the characterization of the case, but it would be my intention not to grant reconsideration.

MR. COSSACK: Then I'll submit it on that basis.

MR. KAPLAN: Submitted as to Leon as well.

MR. LICHTMAN: Submitted, Your Honor.

THE COURT: It's awfully hard for me to conclude, which is really what you're requiring me to do, that every time the Supreme Court grants certiorari it's going to reverse. That's what it amounts to. I'm reluctant to do that. I think the Illinois case is [7] pretty strong or close in the sense that I think if that case is reversed, it would probably control this case. But I don't know whether it would be reversed or not.

I'm going to deny the motion for reconsideration because I just don't think I can just hold this case in abeyance on the basis of speculation of what the Supreme Court is going to do. I frankly think what you ought to do is file your notice of appeal and then ask the Ninth Circuit for a stay pending the decision in this case. That, of course, you won't have any supreme trial problems.

I don't think I can really do that here because, one, I don't want to second-guess the Supreme Court. And there's no way to handle your problem without doing that.

So the motion for reconsideration is denied. I think you should ask the Circuit for a stay.

MR. DAVIDSON: I understand, Your Honor.

Your Honor, may I submit an order excluding from Friday until today. I know that's only three days.

THE COURT: The day the motion was made?

MR. DAVIDSON: Because of the motion, yes.

THE COURT: Yes.

MR. DAVIDSON: We might be getting fairly [8] close.

THE COURT: And then I assume you are going to file a notice of appeal.

MR. DAVIDSON: Probably tomorrow morning.

MR. COSSACK: May I object to the exclusion of time of those three days for the record?

THE COURT: It's provided under the rule. You can object, but it's a specific exclusion under the rule, under the statute, pendency of a motion.

I suggest if you are going to appeal you ought to get your notice on file as soon as you can so you can then start that period tolling before the interlocutory appeal.

MR. LICHTMAN: I would like to just inquire whether the notice of appeal is to be filed as to all defendants.

THE COURT: That's a good question, Mr. Davidson, because I think basically with respect to—well, it must be your client, Mr. Lichtman, motions were denied.

MR. DAVIDSON: Your Honor, the Court excluded some, not very much, but a little bit of evidence as to Mr. Lichtman's client, Mr. Del Castillo. There was some marijuana debris in the trunk of Mr. Del Castillo's car. And our view—

[9] **THE COURT:** You just want to treat them all together.

MR. DAVIDSON: Yes.

THE COURT: So you say you have something to hang your hat on.

MR. DAVIDSON: The answer is yes, we will be filing notice of appeal as to all defendants.

MR. LICHTMAN: I don't know if I need to, but I should probably ask the Court if there is going to be an appeal to appoint me for the appeal. I don't know that the appointment is automatic.

THE COURT: I don't either. Well, I think you should be appointed because obviously when the defendant is an appellee as opposed to the appellant, you probably don't even reach the test of whether the appeal is frivolous. All right. I will appoint you on the appeal.

MR. ABZUG: There is one other matter with respect to my client, Armando Sanchez, Your Honor. Given the fact that even without a stay from the Ninth Circuit pending the disposition of the Gates case, that the appellate process will be quite lengthy, my client would like to make an application to the Court for modification of his bail. I've discussed an intention time for such a hearing with Mr. Davidson, and he said [10] subject to the Court's conven-

ience, he would have no objection to a hearing next Tuesday, if the time would be convenient with the Court. I know that Mr. Sanchez' pretrial service officer is very supportive, and I would like him to have an opportunity to file a supplemental report with the Court.

THE COURT: All right. What about coming in at 9:30 on Tuesday.

MR. ABZUG: Fine.

MR. LICHTMAN: Your Honor, just for the record, I assume that the bonds which are currently in effect for the trial would remain in effect for the appeal.

THE COURT: Well, it's not that kind of appeal. It's an interlocutory appeal. I think the answer is yes. It remains in effect without any further order, isn't that right, in this kind of appeal, an interlocutory appeal by the Government?

MR. DAVIDSON: I believe that's correct, Your Honor.

MR. ABZUG: Thank you.

MR. COSSACK: Thank you, Your Honor.

MR. LICHTMAN: Thank you.

MR. KAPLAN: Is the trial—

THE COURT: That means the trial date is— [11] there was never a trial date. If it were, it is vacated until after the appeal. Isn't that right?

MR. DAVIDSON: We will be filing notice of appeal, yes, Your Honor.

THE COURT: So there is no trial date.

MR. KAPLAN: Thank you, Your Honor.

THE COURT: We are all believing the Government's representation that an appeal will be filed.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Criminal
No. 81-907-AWT

UNITED STATES OF AMERICA, PLAINTIFF,

v.

ALBERTO A. LEON, ARMANDO L. SANCHEZ, PATSY ANN
STEWART, AND RICARDO ALBERT DEL CASTILLO,
DEFENDANTS.

REPORTER'S CERTIFICATE

I, ROBERT F. STARK, C.S.R., hereby certify that I am a duly appointed and qualified official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing pages comprise a true and correct transcript of the proceedings had in the above-entitled cause, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of February, 1982.

/s/

ROBERT F. STARK, CSR

In the Supreme Court of the United States

No. 82-1771

UNITED STATES, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL

ORDER ALLOWING CERTIORARI. Filed June 27, 1983.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

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Office-Supreme Court, U.S.
FILED

MAY 24 1983

ALEXANDER L. STEVAS,
CLERK

No. 82-1771

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES OF AMERICA,

Petitioner,

vs.

ALBERTO ANTONIO LEON, et al,

Respondents.

**OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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IN THE

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FOR THE NINTH CIRCUIT**

Armando Sanchez and Patsy Stewart,
through their attorney Roger L. Cossack,
responds in opposition to the
Government's petition for a writ of
certiorari and urges this Court not to
grant the Government's request.

ADOPTIONS

Armando Sanchez and Patsy Stewart adopt in toto the Government's statements entitled "Opinions Below", "Jurisdiction", as well as Appendices A, B, C and D.

JOINDER

Respondents Alberto Antonio Leon, and Ricardo Albert Del Castillo join in this opposition.

REASONS FOR NOT GRANTING THE PETITION

I.

THERE WAS NOT A VALID JUDICIAL FINDING OF GOOD FAITH IN THIS MATTER, AND THERE WAS NO HEARING OR EVIDENCE PRESENTED ON THAT ISSUE.

The urging by the Government of a finding of good faith by the trial court

is misleading and should not be considered as a finding by this Court. The statement made by the trial judge and cited by the Government (Government's Writ for Certiorari, P.14a) (hereinafter cited as G.P.) occurred during a hearing on a motion brought by the Government for reconsideration which was subsequently denied. During the hearing, the Assistant United States Attorney requested a finding of a good faith exception based on a record which did not show bad faith. (G.P. P.13a) The Court simply stated he believed the officer's testimony that he had gone to three (3) deputy district attorneys for assistance in preparing his affidavit for the search warrant before he went to the magistrate for the warrant. (G.P. P.14a)

In the instant matter, there are several areas wherein the good faith of the officer would have been examined if a hearing on the issue would have occurred. For example:

(1) The information which was used for probable cause was passed on to the police through a confidential informant. The defense attempted to question the officer about this informant, and was successfully prevented from doing so by the Government.

MR. COSSACK: You indicated that you were contacted by confidential informants in August of 1981.

Is that correct?

MR. ROMBACH: Yes.

MR. COSSACK: Were you contacted by the confidential

informant or were you contacted by someone else?

MR. ROMBACH: I was contacted by the informant.

MR. COSSACK: All right. Was the informant in custody of a police officer at that time?

MR. ROMBACH: No.

MR. DAVIDSON: Objection, your Honor, as going outside of the scope of the affidavit. The affidavit speaks for itself.

And, failing any false statement of which there has been no allegation on this, testimony on probable cause would be irrelevant.

MR. COSSACK: Your Honor, if I might state this: the case of *People v. Theodore*, which is the

leading California case so far as known on search warrants, I would be allowed to go behind the face of the search warrant and the search warrant.

As the Court knows, we made a motion to find out who that informant was, and that motion was denied.

This is going to be my chance, at least, to talk to Officer Rombach about what he heard from that informant.

I think the California case allows me to do that, and I would ask the Court to allow me to ask these questions.

THE COURT: I don't believe whatever else the informant may have told him on the search

warrant is relevant, so the objection is sustained.

MR. COSSACK: Very well, your Honor.

BY MR. COSSACK: Officer Rombach, did the informant that you spoke to, was it August 18th that you spoke to the informant?

MR. ROMBACH: Yes.

MR. COSSACK: Was the informant -- did the informant receive any kind of reward or lesser sentence or help from the Police Department for giving the information?

MR. DAVIDSON: Objection, your Honor.

THE COURT: The objection is sustained. Same subject matter.

Reporter's Transcript of District Court Proceedings, Page 42, lines 1-25, Page 43, lines 1-16.

Therefore, the Court had no information in which to decide if it was reasonable for the police officer to believe the informant. Was he (she) a paid informant? Was he (she) an individual who was trading information in return for a lessening of a sentence? The Court and the defense were never told.

(2) If good faith is to be a defense to illegal police conduct, then a full and complete hearing must be held with

cross-examination allowed as to why the officer concluded the information was reliable. It would appear that there was an unsolvable tension between a claim of good faith exception by the police versus a claim of informant confidentiality. How can a magistrate or a court decide good faith without interviewing and seeing those individuals that the officer claims he reasonably believed?

II.

A GOOD FAITH EXCEPTION WOULD NOT AFFECT THIS CASE AS STATE LAW IS CONTROLLING.

This matter was investigated by the City of Burbank Police Department who also arrested the respondents. The search warrant was issued by a Los Angeles Municipal Court Judge acting as

a magistrate. The request for the search warrant, as well as the affidavit was prepared and signed by Officer Rombach, a Burbank Police Officer. The assistance he received was from three (3) Los Angeles County Deputy District Attorneys who were presumptively relying on California law. 1/

The briefs presented to the District Court contained citations to state as well as federal law along with a request and motion that state law be the basis for the court's decision. This issue was never resolved as the trial court found the warrant lacking in probable

1/ Why this matter was in the federal system at all was of great concern to the Ninth Circuit Panel who heard oral argument in this matter. The thrust of Justice Ferguson's initial questions to the Assistant United States Attorney was to request an answer to this question.

cause under federal standards and did not have to reach the federal - state issue.

Therefore, even if this Court resolved the good faith issue as the Government requests, it would have no effect in this matter as state law would be controlling.

III.

THIS MATTER PRESENTS NO NEW AND NOVEL ISSUE TO THE COURT.

This case does not present any new or novel issue with which this Court should concern itself. The Government admits that it

". . . raises precisely the same issue that is now pending before the Court following the reargument in *Illinois v. Gates*,

NO. 81-430 (reargued March 1,
1983)." (G.P., P.10)

CONCLUSION

The Government's Petition for a Writ
of Certiorari should not be granted in
light of the above reasons stated.

Respectfully submitted.

ROGER L. COSSACK

Attorney for Respondents
Armando Sanchez and
Patsy Stewart

MAY 1983

SEE COMPANION CASE

NOV 28 1983

ALEXANDER L. STEVENS,
CLERK

No. 82-1771

IN THE

Supreme Court of the United States

October Term 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

ALBERTO ANTONIO LEON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENT,
ALBERTO ANTONIO LEON.

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Question Presented.

Where police seize evidence pursuant to a warrant issued without probable cause, should this Court refuse to apply the exclusionary rule when that evidence is offered in the government's case-in-chief, on the rationale that the Court should ignore the admitted Fourth Amendment violation and look only at the subjective and objective good faith of the searching officer, despite the exclusionary rule's function as the only meaningful systemic disincentive to such constitutional violations?

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No. 82-1771

IN THE

Supreme Court of the United States

October Term 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

ALBERTO ANTONIO LEON, *et al.*,

Respondents.

BRIEF FOR RESPONDENT, ALBERTO ANTONIO LEON.

Statement of Facts.

This case involves a single warrant authorizing the search of three houses and four automobiles. [J.A. 34-35] One of the houses is located on South Sunset Canyon in Burbank, California, and owned by Respondent Alberto Leon. Respondent Leon adopts the facts as stated by Petitioner, with the addition of the following information from the affidavit in support of the search warrant, relative to purported cause to search the house on South Sunset Canyon.

On August 18, 1981, the affiant, a Burbank California policeman, received a tip from an unproven confidential informant that the occupants of 620 Price Drive, later identified as Respondents Stewart and Sanchez, were dealing in drugs. [J.A. 37] The informant claimed to have seen a drug transaction and a large amount of cash at the Price Drive house five months earlier. [*Id.*] This informant made no mention of Alberto Leon. [*Id.*]

Officers conducted periodic surveillance of the Price Drive house beginning on August 19. [J.A. 38] On August 24, they saw someone arrive and leave in a car registered to Respondent Del Castillo. [*Id.*] They learned from police records that while Del Castillo was on probation, at an undisclosed time between January, 1979, and March, 1981, he listed an

address and phone number for his employer, which was found to be listed to "Albert" Leon. The address was 320 Stocker, in Glendale, California. [J.A. 39]

Nine days later, on August 28, surveillance officers saw Respondent Sanchez leave the Price Drive residence and drive to a house at 715 S. Sunset Canyon in Burbank. [J.A. 42] Utilities and the telephone at this house were listed to "Albert" Leon. [J.A. 40] Sanchez stayed in the house for twenty minutes, and left with what is described as a small package. [J.A. 42] Mr. Leon was not seen at this or any other time throughout the investigation, though a car registered to Leon was parked on the street in front of the house at the time of Sanchez's visit. [Id.]

Three weeks after that, on September 19, an unidentified male drove from the Price Drive residence to the house on Sunset Canyon at some time after 10:00 p.m. in a car registered to Armando Sanchez. [J.A. 48-49] The visitor left Sunset Canyon shortly after midnight, and drove back to Price Drive. [J.A. 49] During his visit, a car registered to Albert A. Leon and Denorah Jimenez was parked in the driveway of the Sunset Canyon house. [Id.] No further activity regarding Sunset Canyon or Alberto Leon was observed by the officers.

In addition to the above facts, the affidavit referred to Respondent Leon's arrest record and statements from two unproven informants.

In July of 1981, the affiant learned from the Glendale, California police that an unnamed informant had said, on an undisclosed date, that Albert Leon had a quantity of quaalude tablets in his residence on Stocker in Glendale. [J.A. 40] The affidavit includes no facts about the informant's identity or credibility. During the last week of August, the affiant was told that the informant had been unwilling to attempt to purchase drugs from Leon. [Id.]

In April of 1980, Leon and three others had been arrested by the Burbank police and charged with possession of drugs. [J.A. 39] The affiant was apparently somehow involved in this arrest. [Id.] The District Attorney declined prosecution of Leon, and one of the other arrestees was ultimately convicted of possession of the drugs found at the time of the arrest. [Id.] One of the arrestees, Kathleen Wolsic, was questioned while in jail. [J.A. 39-40] She said she could not give any information about Leon, because he was involved with the "Cuban Mafia" and drug importation. [J.A. 40] The affidavit lists no details about Kathleen Wolsic's background, nor any asserted basis for her statements about Leon.

The only other information relating to Respondent Leon in the affidavit is that he was arrested in Laguna Beach, California, in 1979 for possession

of a "small quantity" of drugs; the affiant found no record that he was convicted in that incident. [J.A. 40]

In ruling on the motion to suppress, the district court found:

"There is no question of the reliability and credibility of the informant as not being established. . . . The material referring to the other information [sic] with respect to the defendant Leon, I think is in about the same category. If he was the one the information came from, the police department—but again, that is information from some informant about which we know nothing." [J.A. 127]

The district court ruled that only Respondent Leon had standing to suppress items seized from the Sunset Canyon house [J.A. 128], and that Leon had no standing to suppress items seized from any of the other houses and automobiles searched in this case. [J.A. 127-130]

After ruling on the suppression motions, the case was continued to the next day so that the Assistant U.S. Attorney could determine whether the government desired to appeal the rulings before proceeding to trial. [J.A. 130-131] On the following day, the Assistant requested the court to make a finding "that the officers acted in good faith." [J.A. 139] This was the first and only occasion on which reference was made to the issue of good faith during the suppression motion hearing; there was no argument or additional testimony presented on this issue.

Summary of Argument.

In this case, evidence was seized by state officers under a search warrant which was not supported by probable cause. Petitioner proposes that this evidence obtained in violation of the Fourth Amendment should be admissible in federal court as part of the government's case in chief. The essence of Petitioner's argument is that because: (1) the principal rationale for the exclusionary rule in any context is merely deterrence of the searching officer and (2) an officer who "reasonably" relies on a warrant cannot be deterred; the rule should not apply to searches conducted under a warrant unsupported by probable cause, in light of the overwhelming value of the seized evidence in the search for truth and the conviction of suspected criminals. Creating this unprecedented exception would inevitably be translated to the "reasonable, well trained" police officer as a new rule: by simply getting a magistrate's signature on a warrant, the search almost always will be "legal," and whatever evidence is discovered will be admissible. While this may increase incentives to utilize warrants, it will also eliminate any incentive to comply with the probable cause requirement.

The Court should not condone such violations of the Fourth Amendment. This exception would rest on an empty and unprecedented distinc-

tion between police conduct and constitutional violations by magistrates. In practice, it would nullify the purpose of the Warrant Clause, substantively denigrate the probable cause standard, cause increasingly complex and burdensome litigation, undermine the systemic deterrence function of the exclusionary rule and encourage unconstitutional searches.

The proposal would inappropriately focus the Court's attention on the conduct of the police officer in obtaining and executing a warrant and allow the use of warrants unsupported by probable cause as if they were authorized by the Constitution. Yet any otherwise suppressed evidence "saved" by the proposed exception would be evidence which the framers of the Warrant Clause determined should not have been seized. In effect, Petitioner seeks to rewrite the Fourth Amendment to read: "No Warrants shall issue, but upon an undefined showing of something a police officer perceives as close to a substantial basis for probable cause, as irrefutably determined, reasonably and unreasonably, by a magistrate."

For practical purposes, the good faith exception rationale takes the unprecedented step of eliminating any judicial review of a magistrate's finding of probable cause. Magistrates authorize the invasion of homes in hurried, *ex parte* proceedings. The *ex parte* nature of these proceedings is justified by the assumption that the victim of the search will have an opportunity for later judicial review of the probable cause finding in an adversary context. Across the country, over 10,000 magistrates in 59 court systems in 39 states are non-attorneys with authority to issue search warrants. Many are not required to have any legal training or even a high school diploma. These people have license to authorize the invasion of homes by police to ferret out evidence of suspected wrongdoing. Much of this evidence would be admissible in federal court. Petitioner proposes to allow these magistrates to authorize such invasions without any meaningful judicial review of their decisions, despite the fact that often, as in this case, the searches will be prohibited by the Fourth Amendment.

Magistrates must rely on judicial review to provide guidelines for their determinations, particularly under the fluid standards of *Illinois v. Gates*, — U.S. —, 103 S. Ct. 2317 (1983). Absent judicial review under the proposed exception, reviewing courts will lose control over the decreasing probable cause standard applied by magistrates, who will come to rely on the "substantial basis" standard of review as the standard to be applied in initial probable cause determinations. As a result, many magistrates will increasingly become mere rubber stamps, and there will be no alternative available to ensure that magistrates apply the proper standards of the Warrant Clause. In *Gates* the Court recognized this

problem by emphasizing the necessity of continued judicial scrutiny of magistrates' decisions. Petitioner's proposal would do away with this safeguard, effectively overruling *Gates*.

The proposed exception would also remove police incentives to comply with the probable cause standard and would encourage violations of the substantive requirements of the Warrant Clause, by encouraging magistrate shopping and discouraging internal review of warrant applications and thorough pre-warrant investigations to confirm probable cause. Police will be encouraged to maintain the knowledge attributable to the "reasonable" officer at a minimum level of constitutional sensitivity. The practical elimination of search and seizure litigation in good faith cases would effectively freeze the development of Fourth Amendment law at a time when significant questions of the constitutional protection of privacy against governmental intrusion remain to be answered. Moreover, the proposed good faith exception would wreak havoc with settled precedent in many areas of the law. In addition, other warrant clause violations, such as the lack of particularity or a neutral and detached magistrate, would go unchecked under the good faith rationale, despite the clear mandate of the Fourth Amendment.

The exception involves unworkable standards to determine what is "reasonable," what is a "well-trained" officer, and a host of other issues. Its application requires unavoidable subjective inquiries, fraught with the potential for police perjury. These issues will necessitate complex, multi-layered and overly burdensome judicial hearings.

The application of the exclusionary rule and its concomitant "cost" has been severely limited in recent years. This is exemplified by the application of standing requirements in this case. Despite the lack of probable cause for any of the five searches involved in this case, little evidence was suppressed as to any defendant. The bulk of the illegally seized contraband was not suppressed because no defendant had a reasonable expectation of privacy in the alleged "stash pad" where it was found.

Statistical studies establish that overall, relatively little evidence is excluded under the rule. Moreover, the amount of evidence seized under warrants and ultimately suppressed is not substantial. The proposed exception would not even "save" all of that evidence, unless it would include evidence seized in reliance on a wholly conclusory warrant application.

The exception would also significantly dilute the probable cause standard. Reviewing courts will focus only upon the reasonableness of an officer's reliance on the warrant, without defining the actual boundaries

of probable cause. As a result, that standard will degenerate to something only "reasonably" close to probable cause as viewed through the eyes of a police officer, in derogation of the required independent assessment by a detached magistrate mandated by the Warrant Clause.

In this case the exclusionary rule is constitutionally mandated. The Fourth Amendment presumes its enforcement. Cases limiting peripheral applications of the exclusionary rule, based on a cost-benefit analysis of its deterrent function, presume that the rule will be applied in federal court to the use of evidence in the government's case-in-chief. Application of a cost-benefit analysis to this central application of the rule is inappropriate. The balancing of costs and benefits in this situation is inconsistent with this Court's approach to analogous violations of the Fifth and Sixth Amendments.

A practical exception to the requirements of the Warrant Clause will affirmatively encourage violations of the Fourth Amendment's probable cause standard. The Constitution is blind to public sentiment and compels the Court not to waiver from the conclusion, consistently affirmed and reinforced by 70 years' experience, that the core application of the exclusionary rule is the only meaningful judicial inducement for compliance with the Warrant Clause, the heart of the Fourth Amendment.

The rule's core value as a systemic disincentive against Fourth Amendment violations has been consistently upheld by the Court and its application in this context is a constitutionally compelled remedy. The rule has been proven to be a significant systemic deterrent. As applied to a search warrant issued without probable cause, it encourages compliance with that standard by magistrates and by the police, promotes thorough investigation and internal review of warrant applications, and discourages magistrate shopping and reliance on unreasonable warrants.

No alternative is available to remedy the acknowledged Fourth Amendment violations to which the proposed exception would apply. Even if civil remedies were available, they would be precluded by the same "good faith" defense which is the basis for the exception.

Even if the Court chooses to abandon meaningful enforcement of the probable cause standard for certain "reasonably unreasonable" warrants, the facts underlying the search of Respondent Leon's house on Sunset Canyon fall so far short of probable cause to believe contraband would be found there that any good faith exception to the Warrant Clause cannot apply to that search.

The tips regarding Leon, as set out in the warrant application are stale and include no corroboration or facts regarding the informants' credibility,

reliability, or basis of knowledge. Moreover, the warrant application does not provide any facts indicating that contraband would be found in Mr. Leon's house in Burbank. The warrant did not meet the substantial basis test reiterated in *Gates*. Although the good faith issue was not litigated in the trial court, the warrant to search the Sunset Canyon house could not have been reasonably relied upon in good faith by a well-trained officer.

ARGUMENT.

I.

IN PRACTICE, AN EXCEPTION TO THE EXCLUSIONARY RULE FOR "REASONABLE, GOOD FAITH" RELIANCE ON AN ILLEGAL SEARCH WARRANT WOULD INFLICT ENORMOUS DAMAGE TO FOURTH AMENDMENT INTERESTS.

A. A "Reasonable Good Faith Reliance" Exception as Applied to Search Warrants Would Bar Any Meaningful Review of a Magistrate's Decision.

While going to great pains to justify a dramatic modification of the exclusionary rule's scope, Petitioner has not defined the precise terms of the proposed "reasonable mistake" or "reasonable good faith reliance"¹ exception. Indeed, Petitioner admits that application of the proposed modification cannot be "precisely mapped out" [P. Br. at 48], and asserts that "many of the practical details concerning the application of such an exception are best left to future cases and initial resolution by lower courts. . . ." [P. Br. at 77] Yet assuming that the economic cost-benefit analysis espoused by Petitioner is appropriate in examining the proper scope of the exclusionary rule,² it is essential to define the scope of the proposed exception. It then becomes clear that in theory a "reasonable, good faith" exception does not accomplish a great deal, while in practice it imposes enormous damage to Fourth Amendment interests.

The proposed exception would presumably make available certain evidence which is currently excluded from use in the government's case-in-chief because it was seized pursuant to a warrant which was not supported by probable cause. If the reasonable good faith test applies to the

¹In framing the question presented in the Petition for Certiorari, Petitioner referred to "reasonable good faith reliance on a search warrant" [Petition for Writ of Certiorari, hereinafter cited as Pet., at i]. In its brief of the merits, Petitioner refers to a proposed "reasonable mistake exception" [see, e.g., Petitioner's brief, hereinafter cited as P. Br., at 77]. As explained *infra*, pp. 30-37, this variance in terms belies the conceptual vagaries and contradictions in the proposed modification.

²Respondent Leon submits that this analysis is not appropriate to judicial enforcement of the protections guaranteed by the Fourth Amendment, in the context of evidence presented by the government in federal courts as part of its case-in-chief against the victim of a governmental violation of the Fourth Amendment. See *infra* pp. 58-60.

magistrate who issued the warrant, in theory few warrants would fall within the exception.

Last term, the Court held that a magistrate's finding of probable cause will not be disturbed if the magistrate had a "substantial basis," under the "totality of the circumstances" for finding a "fair probability" that the sought items will be found in the place to be searched. *Illinois v. Gates*, — U.S. —, 103 S. Ct. 2317, 2331-32 (1983). The Court reiterated its policy of "great deference" to a magistrate's finding of probable cause, and its aversion to a grudging or negative attitude by reviewing courts toward warrants. *Id.* at 2331. Given the strong policy of deference to the magistrate's finding, it is unlikely that a finding of probable cause which was not supported by any substantial commonsense basis for finding a fair probability would be determined to be a "reasonable, good faith mistake."³

Therefore, the exception proposed by Petitioner, if it were to apply to the issuing magistrate, is to some extent the equivalent of the law articulated in *Gates*.⁴ To the extent the magistrate had an objectively reasonable belief in probable cause, the warrant is within the proper scope of the Fourth Amendment. If framed as a matter of the magistrate's subjective good faith, the proposed exception would merely restate the constitutional requirement that the magistrate be "neutral and detached."

It follows that the proposed exception to the exclusionary rule is actually an exception to the Warrant Clause, which would focus only upon the conduct or state of mind of the officer who executes the warrant.⁵ As a result, the broad discretion exercised by the magistrate who issues a search warrant would be virtually immune from judicial review.

³The probable cause standard takes into account objectively reasonable mistakes of fact. *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979); *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *Henry v. United States*, 361 U.S. 98, 102 (1959). The standard already affords precisely the scope for reasonable factual errors which would be accomplished by a reasonable good faith exception.

⁴This point was recognized by Justice White in his concurring opinion: "The Court's own holding that the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for concluding that probable cause existed . . . is itself but a variation on the good-faith theme." *Illinois v. Gates*, 103 S. Ct. at 2338 (White, J., concurring).

⁵This is necessarily conceded by Petitioner as a result of the contention that the exclusionary rule deters only police and not judicial misconduct. In wrestling with the problem of avoiding warrants devoid of non-conclusory facts to support probable cause, as in *Nathanson v. United States*, 290 U.S. 41, 46 (1933) and *Aguilar v. Texas*, 378 U.S. 108, 113-14 (1964), Petitioner attempts to focus on the officer's conduct by asserting that no well-trained officer would reasonably believe that such a warrant should issue. P. Br. at 66 n.28.

1. Abdication of Judicial Control Over Magistrates Is Precluded by *Stare Decisis*.

This Court has consistently required and relied upon judicial scrutiny of magistrate determinations of probable cause.⁶ In *Illinois v. Gates*, 103 S. Ct. at 2332, the Court emphasized that there are clearly "limits beyond which a magistrate may not venture in issuing a warrant," citing conclusory affidavits of *Nathanson* and *Aguilar* as examples. The Court concluded that "[i]n order to ensure that such an abdication of the magistrate's duty does not occur, courts *must continue to conscientiously review* the sufficiency of affidavits on which warrants are issued." *Id.* (emphasis added).

The provision of an opportunity to review the issuance of a warrant is considered a major function served by the Warrant Clause. See *United States v. Christine*, 687 F.2d 749, 756-57 (3d Cir. 1982). Application of a simplistic test which stops with an officer's reasonable reliance on a signed warrant would require the courts to abdicate essential control over the magistrate's exercise of discretion.

2. Judicial Review Is Essential Because Non-Attorney Magistrates Make Important *Ex Parte* Factual Determinations.

Search warrant applications necessarily involve an *ex parte* proceeding without the benefit of adversary representation of Fourth Amendment interests. This process is generally marked with urgency and a heavy reliance upon untestable hearsay.⁷ In this context, the magistrate will tend to rely upon the initiative of the party presenting the application.⁸ As

⁶In a long line of cases, the Court has consistently upheld the necessity of review of the warrant process to ensure the propriety of underlying probable cause decisions. See, e.g., *Franks v. Delaware*, 438 U.S. 154, 184-85 (1978) (Rehnquist, J., dissenting); *Spinelli v. United States*, 393 U.S. 410, 419 (1969); *Aguilar v. Texas*, 378 U.S. 108, 111 (1964); *Giordenello v. United States*, 357 U.S. 480, 483 (1958).

⁷In many jurisdictions, magistrates may issue warrants by telephone. See, e.g., FED. R. CRIM. P. 41(c)(2) (Supp. 1983); ARIZ. REV. STAT. ANN. § 13-3914 (C) (1978); CAL. PENAL CODE §§ 1526(b), 1528(b) (1982).

⁸See Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1024 (1974); Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 571 (1983) [hereinafter cited as Kamisar, *The Exclusionary Rule*].

observed by the *Franks* Court, "[i]t is the *ex parte* nature of the initial hearing . . . that is the reason for the review." *Franks*, 438 U.S. at 169. Despite the deference accorded to the magistrate's fact determination, and occasional disagreement regarding particular findings of probable cause, it appears that not a single Justice of this Court since *Weeks* has ever voted to decide a case on the ground that the magistrate's decision is immune from judicial review. The *ex parte* nature of warrant application proceedings can only be justified by the assurance of an opportunity for later judicial scrutiny in an adversary context.⁹

The danger of an abuse of discretion in the context of the *ex parte* issuance of search warrants is incalculably increased by the minimal qualifications required to act as a magistrate with full authority to issue search and arrest warrants. "[I]t has never been held that only a lawyer or judge could grant a warrant, regardless of the court system or type of warrant involved." *Shadwick v. City of Tampa*, 407 U.S. 345, 348 (1972). *Shadwick* approved issuance of an arrest warrant for violation of a city ordinance by a municipal court clerk whose job qualifications required no law degree or legal training. *Id.* at 347. The Court limited its holding to the warrant in question, noting that the clerk was not authorized to issue search warrants or even a misdemeanor arrest warrant. *Id.* In practice, judicial systems have granted authority far beyond that in *Shadwick*. For example, in *State v. Upchurch*, 267 N.C. 417, 148 S.E.2d 259 (1966), a search warrant was issued by an assistant clerk of the recorder's court of Durham County, North Carolina. The state supreme court found the clerk did not have "the slightest comprehension as to what her legal duties and responsibilities are in connection with the issuance of a search warrant." *Id.*, 148 S.E.2d at 261.¹⁰

The specter of a warrant issued by a person with no meaningful legal training is a very real problem in the American judicial system. A recent study found approximately 14,000 non-attorneys acting as judges in the

⁹Certainly the warrant to search Respondent Leon's house on Sunset Canyon would never have been issued if his interests had been represented when the magistrate considered the warrant application. That warrant illustrates how the absence of cause to search a given place is easily overlooked in an *ex parte* consideration of a warrant application which lists a number of locations to be searched.

¹⁰The assistant clerk had testified regarding her practice when officers requested a warrant that "all I can say is they come in and ask if I will witness their signature, and I witness it." *Id.*, 148 S.E.2d at 260.

United States. L. SILBERMAN, *NON-ATTORNEY JUSTICE IN THE UNITED STATES: AN EMPIRICAL STUDY* 25 (1979) [hereinafter cited as *NON-ATTORNEY JUSTICE*]. The study found that most lay judges are elected [*id.* at 25], most are authorized to issue arrest and search warrants [*id.* at 29], and many had no formal training even after assuming the bench.¹¹ Of the 44 states with non-attorney judges, 19 do not require any type of training program [*id.* at 236]; a few merely require the judge to be a high school graduate, while others require that a judge be "literate." [*Id.* at 25.]

The study specified 56 court systems in 36 states where non-attorney magistrates are authorized to issue search warrants. Of these 56 court systems, 26 have absolutely no training requirement, 50 have no minimum age for magistrates, and 48 do not even require a high school diploma.¹² Approximately 10,580 non-attorney magistrates sit in the 56 state court systems which authorize lay magistrates to issue search warrants.¹³ An independent survey and analysis of current state court systems by counsel for Respondent has verified that non-attorney magistrates are authorized by statute to issue search warrants in various court systems in at least 39 states as of this year.¹⁴ Moreover, in a number of states a search warrant may be issued by a non-attorney clerk.¹⁵

¹¹*NON-ATTORNEY JUSTICE*, *supra*, at 74. The study noted that prior occupations of lay judges included auto dealer, land developer, farmer, bus driver, mail carrier, policeman, state trooper and copy editor. *Id.* at 75.

¹²These figures are compiled from the "Tabulated Summaries of Lay Judge Statutes," *id.* at 261 app. B. In 39 of the court systems where lay magistrates are authorized to issue search warrants, the magistrates are elected to office. *Id.*

¹³This figure was compiled from the "Lay Judge Census," *id.* at 253 app. A.

¹⁴See Appendix, listing states which statutorily authorize issuance of search warrants by non-attorneys.

¹⁵For example, in Kentucky a clerk of the circuit court may issue search or arrest warrants if there is no judge or trial commissioner in the county when the warrant is sought. KY. REV. STAT. § 15.725 (4) (Supp. 1982). In Massachusetts a search warrant may be issued by a court clerk, assistant clerk, temporary clerk or assistant temporary clerk. MASS. ANN. LAWS ch. 218, § 33 (Michie/Law. Co-op. Supp. 1983). Similarly, in North Carolina warrants can be issued by clerks of court and assistant and deputy clerks of court who have no minimum educational requirements. N.C. GEN. STAT. § 7A-180(5) (1981).

Thousands of non-attorney state magistrates are also authorized to issue search warrants for use in federal court. Fed. R. Crim. P. Rule 41(a) authorizes issuance of search warrants by "a judge of a state court of record within the district wherein the property is located. . . ." Whether a given state court is a "court of record" is determined by state law. *See, e.g., United States v. Walker*, 469 F.2d 1375, 1377 (5th Cir. 1972). Most of the state courts which authorize non-attorney magistrates to issue search warrants fall in this category; as a result thousands of non-attorneys can issue warrants at the behest of federal law enforcement officers or attorneys for use in federal cases. Well over 1,600 of these lay magistrates are not required to have any type of training. Moreover, the fruits of any warrant issued by the 10,580 non-attorney magistrates authorized to do so could be used in a federal criminal case if the officers who obtained the warrant acted independently from federal agents, and the state warrant was not utilized in intentional or deliberate disregard of Rule 41. *United States v. Radlick*, 581 F.2d 225, 228-29 (9th Cir. 1978).

3. The Current Flexible Standard of "Reasonableness" for Finding Probable Cause Provides Little Guidance for Magistrates, and Its Application Requires Judicial Scrutiny.

In *Illinois v. Gates*, 103 S. Ct. 2317, 2328 (1983), the Court acknowledged that "probable cause is a fluid concept — turning on the assessment of probabilities in particular factual contexts — not readily, nor even usefully, reduced to a neat set of legal rules." Professor Kamisar has likened this "flexible," "totality of the circumstances" approach to probable cause to the "largely unmanageable and unreviewable totality of the circumstances test" utilized in determining the voluntariness of statements prior to *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Miranda v. Arizona*, 384 U.S. 436 (1966). He notes that while in theory courts were supposed to take into account various factors such as whether the defendant was advised of his right to counsel, asked to see a lawyer, or was allowed to seek advice, in practice few courts actually did take these factors into account. This ultimately compelled the rules set out in *Escobedo* and *Miranda*.¹⁶

A number of commentators have expressed well-founded concern that this flexible approach to the issuance of search warrants will deprive

¹⁶Comments of Yale Kamisar, *Supreme Court Review and Constitutional Law Symposium*, 52 U.S.L.W. 2228, 2230 (October 25, 1983).

magistrates of meaningful guidance.¹⁷ The Court shared this concern in *Gates*, observing that search warrants "long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of 'probable cause'," *Gates*, 103 S. Ct. at 2330 (citation omitted), and concluding that "courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued" in order to ensure that an abdication of the magistrate's duty does not occur, *id.* at 2332.¹⁸

In light of the unguided flexibility afforded magistrates of dubious qualifications,¹⁹ continued judicial review is now of paramount importance. Adoption of the proposed exception to the exclusionary rule, which would focus merely upon the police officer's reliance upon a warrant, would render this judicial review virtually impossible and meaningless at best.

¹⁷E.g., *id.* at 2230; Mertens & Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365, 456 (1981) (hereinafter Mertens & Wasserstrom) (the magistrate "has standards to consult only because the appellate courts have decided enough cases, including some important ones involving review of affidavits in support of warrant applications, to provide guidance").

¹⁸Justice Rehnquist, with the Chief Justice, echoed this reasoning in *Franks v. Delaware*, 438 U.S. 154 (1978):

The Court has thus for more than a decade rejected the first possible stopping place in judicial re-examination of affidavits in support of warrants, and held that the legal determination as to probable cause was subject to collateral attack. While this conclusion does not seem to me to flow inexorably from the Fourth Amendment, I think that it makes a good deal of sense in light of the fact that a magistrate need not be a trained lawyer, see *Shadwick*, *supra*, and therefore may not be versed in the latest nuances of what is or what is not "probable cause" for purposes of the Fourth Amendment.

Id. at 184-85 (Rehnquist, J., dissenting).

¹⁹In her study of lay magistrates Professor Silberman found a major criticism to be their lack of awareness of many legal issues and their inability to analyze legal issues adequately. NON-ATTORNEY JUSTICE, *supra*, at 11. Judges cited requests for search warrants as a particularly problematic area, *id.* at 81, and lawyers criticized lay magistrates' misapplication of probable cause standards, *id.* at 84. The author concluded that search warrant applications should be handled by attorney judges whenever possible. *Id.* at 110. Unfortunately, there is no reason to believe this recommendation is carried out in practice.

4. Under the Proposed Exception, Magistrates Will Inevitably Apply a Diluted Standard for Determining Probable Cause.

Judicial review of magistrate determinations is also necessary to avoid the inevitable dilution of the probable cause standards applied to warrant applications. In any given case, even a highly qualified federal magistrate may erroneously evaluate an affidavit and find a showing of probable cause where none exists. If this occurs in a marginal case, a reviewing court may acknowledge its own doubts regarding probable cause, but defer to the magistrate's finding. This occurs where the reviewing court finds the magistrate's finding to be based upon some corroboration which "reduced the chances" that the informant's tip was a "reckless or prevaricating tale," thus providing a substantial basis for crediting a hearsay tip. See *Gates*, 103 S. Ct. at 2335. In such a case the trial court would not suppress the evidence.

Ultimately, a lower practical standard for issuance of warrants will begin to emerge. This development — "an evisceration of the probable cause standard" — was recognized by Justices White, Brennan and Marshall in their *Gates* opinions. *Gates*, 103 S. Ct. at 2350 (White, J., concurring), 2359 (Brennan, J., dissenting). As magistrates and police officers come to rely upon this reduced standard for probable cause, affidavits inevitably will be presented which fall even further from true probable cause, yet come close to the diluted standard. Given the flexibility of the "fluid" totality of the circumstances test, magistrates will be inexorably drawn to approval of such warrant requests. Judicial review of their determinations is essential to rein in this tendency toward dilution of the probable cause standard.

5. The Potential of Reversal Is a Strong Incentive for Strict Application of the Probable Cause Standard by Magistrates.

The trend toward increasing dilution of the probable cause standard applied to warrant applications by magistrates would not only go unchecked, but would be exacerbated by the virtual elimination of any judicial review of their decisions. It has been observed that a magistrate is "surely more careful because he knows that his probable cause determinations may be reviewed on a motion to suppress."²⁰ In *United States v. Karathanos*, 531 F.2d 26, 33 (2d Cir.), cert. denied, 428 U.S. 910 (1976), the Second Circuit rejected the proposal advocated by Petitioner in this case, reasoning:

²⁰Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 456.

While we do not assume that United States magistrates or state officials authorized to issue search warrants are necessarily prone to act as the "rubber stamp[s] for the police" condemned in *Aguilar v. Texas*, [*supra*, 378 U.S. at 111], the exclusionary rule's effect of making them aware that their decision to issue a search warrant is a matter of importance not only in regard to the constitutional rights of the person to be searched, but also in regard to the success of any subsequent criminal prosecution, may well induce them to give search warrant applications the scrutiny which a proper regard for the Fourth Amendment requires.

This incentive is removed by a "reasonable good faith" exception, in which reasonable reliance on the warrant by the police officer would have the same legal effect as a correct probable cause determination by the magistrate.

As explained *infra* at 26-29, under petitioner's proposal reviewing courts will avoid addressing the application of the probable cause standard to the facts presented to a magistrate. However, even if courts were able and inclined to give such advisory opinions, the lack of any effect on the outcome of the case will render such guidance meaningless to the magistrate. As observed by retired Justice Stewart:

There are constitutional questions about this approach, but let us assume that courts may admit evidence obtained in reasonable good faith while declaring that the warrant pursuant to which it was obtained was not supported by probable cause. Where this is done, the magistrate may receive an opinion, perhaps years after signing the warrant, informing him that a mistake was made. But there is no incentive — apart from a professional desire to comply with the fourth amendment — for that magistrate to refrain from repeating the same mistake in the future or from granting any colorable request for a search warrant.

Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1403 (1983).

6. Without Judicial Review, Magistrates Will Tend to Accede to Pressures From Law Enforcement, and Increasingly Act as Mere Rubber Stamps.

An uninformed or uneducated magistrate in the heat of a hurried request for authority to seize evidence of a crime, can be counted on to yield to pressures from law enforcement officers in *ex parte* proceedings. One

commentator who conducted a nationwide study of misdemeanor courts has observed:

The non-lawyer judge appears to be more willing to assume the role of prosecutor when the prosecuting attorney is not present. However, when the prosecution is present, the non-lawyer judge tends to be more likely to succumb to pressures from the prosecuting attorney.²¹

A recent study of Virginia magistrates revealed that:

. . . 11.4 percent of the magistrates and chief magistrates responding indicated that their personal philosophy concerning the issuance of criminal warrants amounted to rubber-stamping. These magistrates indicated that they felt the standard for issuance of criminal warrants should be: "The police have the best knowledge of the facts of the case. If brought to trial, the judge will try the case on its merits. Therefore, the magistrate should generally issue the warrant."

NATIONAL CENTER FOR STATE COURTS, VIRGINIA COURT ORGANIZATION STUDY, Chap. II at 16 (1979).

This phenomenon was a central factor in a decision rejecting issuance of search warrants by non-attorney magistrates in California:

[T]he potential inability of a layman to appreciate the subtleties of search and seizure questions casts grave doubt upon the ability of a layman judge to meet the required qualification of not only being capable of probable cause determination but also of being neutral and detached. . . . [T]he nonattorney judge is likely to rely heavily on law enforcement personnel for guidance in his decision making when it becomes obvious that his own experiences are so limited as to be of little assistance to him in resolving the probable cause question before him on a request for a search warrant.

People v. Escamilla, 65 Cal. App. 3d 558, 563, 135 Cal. Rptr. 446, 449 (1976).²²

²¹J. Alfani, transcript of speech delivered at Lay Judge Seminar held at New York University, April 1978 (quoted in NON-ATTORNEY JUSTICE, *supra*, at 14).

²²However, a later California decision indicates that non-attorney magistrates may issue warrants. *People v. Mack*, 66 Cal. App. 3d 839, 845-46, 136 Cal. Rptr. 283, 288-89 (1977).

The tendency to succumb to law enforcement pressures is not limited to non-attorney magistrates.

[E]ven in the unusual case where law enforcement officials do seek a warrant, the judicial officer's participation is "largely perfunctory" — it is "notoriously easy" to obtain search warrants or court orders for electronic surveillance, and even easier to obtain warrants for arrest. Thus, almost always the first and only meaningful opportunity to decide the legality of a search or seizure arises after the fact.

Kamisar, *The Exclusionary Rule*, *supra*, 16 CREIGHTON L. REV. at 569-70 (footnotes omitted).²³

The existence of "rubber stamp" magistrates has long been acknowledged. In a very recent study of the search warrant process conducted by the National Center for State Courts, the magistrate who received the most warrant applications in one subject city acknowledged that he had rejected only one search warrant application in 15 years as a judge. Rejections by surveyed judges ranged from about half to "almost never." R. VAN DUIZEND, L. P. SUTTON & C. CARTER, *THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES* 2-12, 2-13 (1983) (draft only) [hereinafter cited as VAN DUIZEND, *THE SEARCH WARRANT PROCESS*].²⁴ The study found that "it was the nearly universal perception among police officers, prosecutors, and judges in all of our cities that very few applications are turned down by magistrates regardless of the [pre-application] screening procedures." *Id.* at 6-3. Many interviewed officers felt judges "often just skim the affidavits looking for key words and phrases." *Id.* at 3-6. In spite of the integrity and outstanding ability of many federal magistrates, it is unlikely that the "rubber stamp" approach is limited to the state court systems. In a related context, out of 5,563 federal and state wiretap authorization requests from 1969 through 1976, only 15 applications were rejected.²⁵

²³See also White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1282 n.32 (1983) (observing that the independence and neutrality of magistrates "are in fact ensured only by the kind of review of their judgments that the exclusionary rule makes possible").

²⁴This study was conducted under a grant from the National Institute of Justice. A copy is on file with the Clerk of the Court.

²⁵H. SCHWARTZ, *TAPS, BUGS, AND FOOLING THE PEOPLE* 23 (1979). At hearings before the National Wiretap Commission, one prosecutor stated "I have not found one judge who takes the time to read an *ex parte* wiretap application." *Id.*

The tendency of some magistrates to yield to pressures from police is in part due to the time pressures on magistrates when called upon to issue a warrant. Normally the requesting officer is hurried, in the heat of an investigation, and anxious to obtain the warrant before the evidence disappears. The magistrate is commonly also strapped for time due to his regular caseload.²⁶ One recent study found the median time spent reviewing a search warrant is two minutes and twelve seconds; 25% of the proceedings took less than 90 seconds, and 71.3% took under three minutes. Only 8.3% of the warrant applications were rejected.²⁷ Under these circumstances, judicial review of the warrant process is critical to provide any meaningful assurance of a reasonable basis for issuance of a warrant.

7. No Alternative Controls Can Assure Magistrate Compliance With Fourth Amendment Standards.

In advocating what will amount to the end of judicial review of magistrates' decisions Petitioner asserts that judicial officers considering warrant applications are "presumably" motivated to reach a correct decision; that the training required for federal magistrates "enhance[s] the presumption of propriety;" and that this enhancement also applies to state court judges. P. Br. at 60 & n.22. As demonstrated above, the assumption that state court judges necessarily have any legal training is fallacious. Moreover, a law degree is no guarantee that a judge will properly make a delicate determination of probable cause under pressures from the police in an extremely limited amount of time and without any concern about future scrutiny of his decision.

Petitioner also naively asserts that where a particular magistrate serves as a mere "rubber stamp," he or she could be removed from office pursuant to 28 U.S.C. § 631(i) (Supp. 1983). Regardless of how ethereal this remedy may be, it seems far more draconian than the exclusionary rule. Moreover, like the issuing judge in this case, most state judges are

²⁶The Los Angeles Municipal Court with annual filings of about 130,000 (excluding parking and traffic) *finds itself so pressed that in large areas of its caseload it averages but a minute per case in receiving pleas and imposing sentence.*

Barrett, *Criminal Justice: The Problem of Mass Production*, in THE AMERICAN ASSEMBLY, COLUMBIA UNIVERSITY, THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 85, 117-18 (H.W. Jones ed. 1965) (emphasis in original).

²⁷VAN DUIZEND, THE SEARCH WARRANT PROCESS, *supra*, at 2-13, 2-14.

elected to office.²⁸ Their removal from office would certainly be problematic, if not impossible. Civil sanctions would also be unavailable, because the warrant-issuing magistrate is immune from suit. *Stump v. Sparkman*, 435 U.S. 349, 363 n.12 (1978).

Eliminating any meaningful review of a magistrate's determination of probable cause is a high price to pay for the amount of otherwise inadmissible evidence seized pursuant to a warrant unsupported by any substantial basis for probable cause. However, this is not the only "cost" of the proposed reasonable, good faith reliance exception.

B. The Proposed Exception Would Undermine the Protections and Procedures Mandated by the Fourth Amendment in Numerous Other Ways.

1. A Reasonable Good Faith Reliance Test Would Remove Police Incentives to Comply With the Warrant Clause Requirement of Probable Cause.

The deterrent function of the exclusionary rule acts not as a punitive sanction for misconduct, but rather, serves to remove or dramatically reduce any incentive to avoid compliance with the Fourth Amendment. This was made clear in the first case the Court decided explicitly on the deterrence rationale: "The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960) (citation omitted).²⁹

²⁸As observed by the Second Circuit in rejecting the proposed good faith exception, the "suggestion that 'magistrate-shopping' or patronization by the police of lenient or 'rubber stamp' justices of the peace could be remedied by removal of the offenders ignores the fact that many state officials entitled to issue search warrants are elected to office." *United States v. Karathanos*, 531 F.2d 26, 34 (2d Cir.), cert. denied, 428 U.S. 910 (1976).

²⁹See also LaFave, *The Fourth Amendment in An Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 353 (1982) [hereinafter cited as LaFave, *The Fourth Amendment*].

Once again, it is necessary to begin with the right question, which is whether admitting the evidence in such instances [i.e., good faith reasonable reliance on a search warrant] would create an additional incentive to infringe upon fourth amendment rights. I see no basis for assuming the answer to be other than yes.

Adoption of a reasonable good faith exception where officers have procured a warrant would remove their current incentive to make sure the warrant will "hold up in court" by careful compliance with the requirements of probable cause. Professor Ball, a leading advocate of the good faith exception relied upon by Petitioner, concedes that a "signal from the Court that it is abating its aggressive enforcement of fourth amendment requirements is apt to evoke a consistent response from the police."³⁰ An extensive study of the New York City Police Department yielded "substantial evidence that the police themselves would not respect courts which did not support constitutional standards by excluding any evidence which was unconstitutionally obtained. . . . [T]o the police, the imposition of the exclusionary rule is a prerequisite for the imposition of a legal obligation."³¹

Retired Justice Stewart has recently expressed his agreement with this conclusion. In rejecting the proposed reasonable good faith exception, he states:

[I]f this exception were adopted, police officers might shift the focus of their inquiry from "what does the fourth amendment require?" to "what will the courts allow me to get away with?" It seems inevitable in these circumstances that adoption of the proposed exception would result in more fourth amendment violations.

Stewart, *supra*, 83 COLUM. L. REV. at 1403 (footnote omitted).

This reasoning was recently adopted by the Court in *United States v. Johnson*, 457 U.S. 537, 561 (1982) in rejecting the argument that retroactive exclusion of evidence could have no deterrent effect:

If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving

³⁰Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. CRIM. L. & CRIMINOLOGY 635, 656 (1978) (footnote omitted).

³¹Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 29 (1980).

the unsettled question. Failure to accord any retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach."

Id. at 561 (footnote, citation and emphasis omitted).

a. *Magistrate Shopping.*

Just as some magistrates apply a more lenient standard of probable cause than others, "[s]ome magistrates vary their requirements for a search warrant with the seriousness of the suspected offense."³² As a result of the variance in standards applied, police frequently engage in "magistrate shopping." "Empirical studies have shown that 'police "shop around" for a magistrate who is lenient' and that there is 'substantial disparity between magistrates as to how much evidence is required to obtain a search warrant.' " LaFave, *The Fourth Amendment, supra*, at 353 (1982) (footnote omitted.)³³

The fact that officers obtain a warrant demonstrates their desire to secure evidence which will be admissible at trial. With no threat of suppression due to a weak warrant application, any incentive to avoid an overly lenient magistrate would be removed.

If a magistrate's issuance of a warrant were to be, as the government would have it, an all but conclusive determination of the validity of the search and of the admissibility of the evidence seized thereby, police officers might have a substantial incentive to submit their warrant applications to the least demanding magistrates, since once the warrant was issued, it would be exceedingly difficult later to exclude any evidence seized in the resulting search even if the warrant was issued without probable cause. . . . For practical purposes, therefore, the standard of probable cause might be diluted to that required by the least demanding official authorized to issue warrants, even if this fell well below what the Fourth Amendment required.

United States v. Karathanos, 531 F.2d at 34.

³²L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *DETECTION OF CRIME* 119 (1967).

³³See also Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 456 n.507.

b. *Thorough Investigation and Internal Review.*

The insulated nature of a warrant under a reasonable, good faith reliance test would also remove incentives for police to conduct thorough pre-search investigations to bolster their showing of probable cause. As warrants are upheld despite showings of less than probable cause, police will learn that more adequate showings are simply not necessary.³⁴

A reasonable reliance exception would also remove the incentive for internal reviews of warrant applications by police and prosecutors. One empirical study found that the prevailing practice in large cities is for all warrant applications to be reviewed by prosecutors before they are submitted to the magistrate, because police "want to be certain that the

³⁴As observed by Professor LaFave:

[T]he risk in such tampering with the exclusionary rule "is that police officers may feel that they have been unleashed" and consequently govern their future conduct by what passed the good faith test in court rather than on the traditional fourth amendment standards of probable cause, exigent circumstances, and the like. . . . Professor Steven Schlesinger, a staunch opponent of the exclusionary rule, recently concluded that the "good faith" proposal "provides little or no deterrence for violations deemed by the courts to be in good faith" because it fosters "a careless attitude toward detail on the part of law enforcement officials" and encourages "police to see what can be gotten away with before the courts draw the line on what is an intentional violation."

La Fave, *The Fourth Amendment*, *supra*, 43 U. PITT. L. REV. at 358 (footnotes omitted).

The "good faith" carelessness of warrant applicants was illustrated in *Kaylor v. Superior Court*, 108 Cal. App. 3d 451, 454-56, 166 Cal. Rptr. 598, 599-600 (1980). The search warrant affidavit contained two sentences, stating that probable cause was established by 155 pages of attached police reports, many of which were "hard to read if they could be read at all." The issuing magistrate was annoyed at the time a thorough review would take, and admitted he did not bother to read all of the reports.

Another telling illustration is the comment of the searching officer in *Illinois v. Gates*, who conceded, prior to this Court's ruling, that in retrospect, if he had understood the exclusionary rule as well then as he does now, he would have conducted a surveillance to better corroborate the anonymous informant's letter before seeking the warrant. CHICAGO LAW., Jan. 1983, at 7. While the officer's salutary concern may have been ultimately undermined after *Gates*, such concerns will be totally erased by a good faith exception whenever a warrant is signed.

procedure is entirely lawful" and will stand up in court.³⁵ A recent study of warrant application procedures in seven cities found that in every city applications were first reviewed by a prosecutor or police supervisor, and in one city were normally drafted by the prosecutor. VAN DUIZEND, *THE SEARCH WARRANT PROCESS*, *supra*, at 2-7, 2-8. In ten to fifty percent of the cases, the affiant was asked to add additional information as a result of the internal screening process. *Id.* at 2-7.³⁶

The Attorney General of Maryland, who is also a former United States Attorney, ascribes major importance to the exclusionary rule in encouraging internal prosecutorial review of warrant procedures, and describes daily conferences between law enforcement officers and prosecutors regarding the application of Fourth Amendment requirements to case facts. He concludes that:

[t]he principal, perhaps the only, reason those conversations occur is that the assistant and the agent want the search to stand up in court

These contacts do not occur because of some self-limiting controls in the police and prosecutors themselves. I hope and trust that most of us in law enforcement are principled enough to avoid violating the clear constitutional rights of suspects. But in the heat of the chase, and in the absence of effective sanction, I believe that we would define those rights somewhat narrowly.

Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, CRIM. JUST. ETHICS, Summer-Fall 1982, at 28, 30.

A reasonable reliance exception would remove any incentive for this important process of internal review. Rather than assuring that the warrant will be ultimately upheld as within the requirements of the Fourth Amend-

³⁵L. TIFFANY, D. MCINTYRE & D. ROTENBERG, *THE DETECTION OF CRIME*, *supra*, at 114.

³⁶See also Miller, *Telephonic Search Warrants: The San Diego Experience*, 9 PROSECUTOR 385, 385 (1974) (San Diego County officers seeking search warrants must first contact a deputy in the District Attorney's office:). The frequency of this practice is further indication why an inquiry about "reasonable good faith" must extend beyond the officer who executed the warrant. See *infra* discussion at 34-35. See also Kamisar, *Public Safety and Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L. & CRIMINOLOGY 171, 179-82 (1962) (noting creation and development of working relationships between police and prosecutors to ensure the obtaining of evidence by means which would not result in its suppression).

ment, police need only focus on obtaining a magistrate's signature. Any further showing beyond the most lenient (and perhaps misconceived) standard of some substantial basis for probable cause will invariably come to be perceived by police as a wasted effort.³⁷

2. The Proposed Exception Would Encourage Police Ignorance of the Law.

The exception proposed by Petitioner takes the novel approach of focusing upon the reasonable belief of the police officer, instead of the magistrate, as to probable cause for the warrant. This focus puts a premium on police ignorance of the law, a consequence which has led a number of opponents of the exclusionary rule to oppose a "reasonable good faith" exception.³⁸ With the assurance that evidence will be admissible where an officer has "reasonably" relied upon a warrant, police departments will invariably tend to train officers that if the warrant is signed, it is reasonable to rely on it.³⁹ Absent the current danger of suppression, if there is any question about a warrant's validity police would have every reason to adopt the "let's-wait-until-it's-decided" approach recently condemned in *United States v. Johnson*, 457 U.S. at 561. As a result, individual officer's beliefs and departmental policies will predictably shift

³⁷The Van Duizend study of the warrant process in seven cities concluded that applying a good faith exception to the exclusionary rule where an officer relies upon a warrant

would further encourage police officers to seek out the less inquisitive magistrates and to rely on boilerplate formulae, thereby lessening the value of search warrants overall. Consequently, the benefits of adoption of a broad good faith exception in terms of a few additional prosecutions appears to be outweighed by the harm to the quality of the entire search warrant process and the criminal justice system in general.

VAN DUIZEND, *THE SEARCH WARRANT PROCESS*, *supra*, at 8-12.

³⁸Judge Wilkey, a staunch opponent of the exclusionary rule, concludes that "[t]he 'good faith' exception puts a premium on ignorance and lack of training in law enforcement agencies." WILKEY, *ENFORCING THE FOURTH AMENDMENT BY ALTERNATIVES TO THE EXCLUSIONARY RULE* 36 (1982). See also Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044 (1974).

³⁹Professor LaFave notes a number of decisions "indicating that an officer may quite properly be held to have acted in 'good faith' when his misunderstanding of his fourth amendment authority was prompted by information conveyed to him by his department concerning that authority." LaFave, *The Fourth Amendment*, *supra*, 43 U. PITT. L. REV. at 344 (footnote omitted).

toward institutionalized ignorance aimed at rendering "reasonable" an officer's reliance on an unreasonable warrant.

3. A Reasonable, Good Faith Exception Would Freeze Development of Fourth Amendment Law.

As recognized recently in *Owen v. City of Independence*, 445 U.S. 622, 651 n.3 (1980), a rule preventing challenge to unconstitutional conduct except in the most egregious cases "could also have the deleterious effect of freezing constitutional law in its current state of development." See also *United States v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting) (excluding good faith actions by police from exclusionary rule "could stop dead in its tracks judicial development of Fourth Amendment rights").

Magistrates who make daily determinations of probable cause are particularly reliant upon appellate guidance in developing coherent standards. This process for expounding and explaining probable cause is especially important in the immediate wake of *Illinois v. Gates*, since the notion of a fluid concept derived from the totality of the circumstances gives little guidance to magistrates faced with infinite circumstantial permutations. While each case must obviously be decided on its own facts, examples of appropriate application of the totality of the circumstances test in various factual settings are critical to inform magistrates faced with similar situations.

Adoption of an exception focusing on the reasonable reliance on a warrant by an officer would relegate all judicial guidance regarding the probable cause standard, or other Fourth Amendment issues, to mere advisory opinions rendered at the option of the court. Such opinions would be inconsistent with Article III of the Constitution.⁴⁰

⁴⁰See, e.g., *Bowen v. United States*, 422 U.S. 916, 920 (1975) (criticizing Ninth Circuit on Article III grounds for ruling on illegality of a search, when decision on retroactivity of *Almeida-Sanchez v. United States*, 413 U.S. 916 (1975) made constitutional ruling unnecessary); *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) ("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"); *Stovall v. Denno*, 388 U.S. 293, 301 (1967) (Article III precludes announcing purely prospective rule of law without application to case in which rule is announced); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) ("The court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). See also *Mertens & Wasserstrom*, *supra*, 70 GEO. L.J. at 450.

Aside from the Article III problem, in practice, courts applying a "good faith" exception will tend to limit their review to how far the officer's conduct exceeded the reasonably perceived objective limits of the law. As a result, there would be no need to re-examine the proper boundaries of the limits themselves in the course of determining the officer's reasonableness. Courts will use this analysis to avoid deciding close and difficult issues of probable cause.⁴¹

Thus only egregious police misconduct would be clearly categorized as violative of the Fourth Amendment. This is conceded by the Petitioner, who asserts that lost decision-making opportunities would be confined to "the grey, twilight area[s]" of Fourth Amendment law where the constitutional violation, if any, is minimal." P. Br. at 82. One wonders whether there can be a "minimal" constitutional violation. The "grey" areas mark the forefront of the development of Fourth Amendment law, and are precisely the areas where judicial guidance is needed most.

Petitioner's implication that every core value under the Fourth Amendment has been settled is belied by history. As noted recently in *United States v. Johnson*, 457 U.S. at 560, "[b]ecause this Court cannot rule on every unsettled Fourth Amendment question, years may pass before the court finally invalidates a police practice of dubious constitutionality." (Citation omitted.) The contention that the exclusionary rule is unnecessary because the bulk of Fourth Amendment violations have been eliminated was made over ten years ago in litigating *California v. Krivda*, 409 U.S. 33 (1972).⁴² Yet in the last eight years alone this Court has applied the

⁴¹Even if not precluded from rendering advisory opinions, appellate courts regularly avoid deciding a constitutional issue where it is not necessary to the outcome of a case. A recent empirical study of the decision-making process in California appellate courts found that reviewing courts utilize "norms of affirmance" — such as the substantial evidence rule and harmless error rule — to avoid inquiry into the validity of factual findings below. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RESEARCH J. 543, 551 (1982). The study found these norms play a significant role in avoiding reversals due to search and seizure issues. For example, findings of abandonment based on repeated and highly improbable police testimony that a suspect dropped contraband when approached by officers are normally upheld under the substantial evidence rule. *Id.* at 598-600, 638.

⁴²Mertens & Wasserstrom, *supra*, 70 GEO. L.J. 365, 398 n.157 (citing Amicus Curiae Brief for Americans for Effective Law Enforcement, Inc., at 17).

exclusionary rule to compel police compliance in a broad array of protected contexts. In future years, courts will be required to define Fourth Amendment norms in any number of developing areas.⁴³

A number of extremely important decisions which have dramatically altered police practices could never have been rendered if the Court relied on a reasonable, good faith exception. These include, for example, *Steagald v. United States*, 451 U.S. 204 (1981); *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Chimel v. California*, 395 U.S. 752 (1969); and *Katz v. United States*, 389 U.S. 347 (1967). In each, a plausible claim that the officer's transgression was not committed in "bad faith" would doubtless have been made because the search or seizure found support in statute (*Ybarra* and *Torres*), because it was part of an apparently routine practice that had not been specifically condemned (*Prouse*), or indeed because it appeared to have been approved in earlier decisions of the Court (*Katz* and *Chimel*) or circuit courts (*Steagald*). Yet the importance of these decisions for the development of Fourth Amendment norms and protection of Fourth Amendment values can hardly be questioned.

Moreover, a reasonable good faith exception would effectively eliminate any incentive to challenge dubious police practices in court. Petitioner asserts without any basis in fact or logic that the number of Fourth Amendment challenges would not decline under the proposed exception. P. Br. at 83.⁴⁴ The pragmatic realities are to the contrary. In any but the most egregious cases, particularly where search warrants are concerned, any constitutional ruling would be simply advisory and would only apply prospectively, if at all, to future litigants. Few criminal defendants have the resources to finance litigation which will have no bearing on the outcome of their cases; fewer still will be inclined to divert valuable time

⁴³The "grey areas" which will require clear definitions of Fourth Amendment boundaries include, for example, new technological advances such as use of parabolic microphones and microwaves by police to eavesdrop on private conversations, or the expansion of allowable police intrusions on less than probable cause as in *Michigan v. Summers*, 452 U.S. 692 (1981) or *United States v. Place*, _____ U.S. _____, 103 S. Ct. 2637 (1983). A good faith exception would excuse questionable police conduct in these and other areas, severely limiting the development of essential guidelines.

⁴⁴This assertion is in obvious conflict with the argument that litigation of suppression motions currently places an unwarranted burden on the judicial system. P. Br. at 74.

and energy away from the defense of their cases in order to settle constitutional issues of only abstract interest. Even assuming a court were able and willing to make difficult Fourth Amendment rulings unnecessary to the decision in a case, it would find few opportunities to do so.⁴⁵

4. A Reasonable Good Faith Exception Will Allow Other Violations of the Warrant Clause to Go Unchecked.

The Petitioner argues that an exception for reasonable good faith reliance on a search warrant is compelled because the only rationale for the exclusionary rule is to deter misconduct by the police. As a result, suppression of blatantly unreasonable warrants would be based upon the police officer's objectively unreasonable reliance on the warrant where "no well-trained officer could reasonably have thought that a warrant should issue." P. Br. at 66 n.28.⁴⁶

The logical extension of this reasoning shows that the exception would swallow the Warrant Clause. The exception, to remain logically coherent, would have to extend to violations of the constitutional requirement that items to be seized be described with particularity. This violation might occur in one of two ways: (1) the warrant may fail to adequately describe the items to be seized, i.e., an impermissible general warrant, or (2) the warrant may purport to authorize seizure of items in addition to those for which there is probable cause, i.e., an overbroad warrant. In either case, the error is attributable to the magistrate who issued the faulty warrant. Since the officer who relies on such warrants could not be held responsible for errors in describing the property to be searched and/or seized, or in defining the scope of the authorized search and/or seizure, violations of the particularity clause would go unchecked, rendering that requirement a nullity.

The rationale of the proposed exception would also extend to, and undermine, the requirement of a neutral and detached magistrate.⁴⁷ Where

⁴⁵On the other hand, the government will have every incentive to argue for extension of the good faith exception whenever evidence might be suppressed. It follows that development of the law, like a one-way ratchet, will move in only one direction — the abbreviation of judicial enforcement of Fourth Amendment protections. See Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 453.

⁴⁶Petitioner fails to indicate how a court decides the standards for a "well-trained officer," or his "reasonable" beliefs regarding a warrant. See *infra* discussion at 30-36.

⁴⁷Petitioner impliedly concedes this is true. P. Br. at 62.

a magistrate has become a mere "rubber stamp," is swayed by a close personal working relationship with the applicant (as may be quite common in a wide variety of settings), is somehow affiliated with law enforcement, or is paid according to the number of warrants issued, he may nonetheless issue a warrant to an executing officer acting in good faith. The rationale espoused by Petitioner would sanction the use of warrants in these circumstances, despite the lack of a neutral and detached magistrate. A number of cases condemning this practice involved no evidence of actual or objectively recognizable bad faith; the Court condemned the warrant because of the potential for collusion proscribed by the drafters of the Fourth Amendment.⁴⁸

In each of these cases, an argument could be made that the magistrate who issued the warrant was in fact acting in a neutral and detached manner, and that reliance upon the warrant was objectively reasonable and perhaps statutorily authorized. Failure to exclude the evidence in such cases would allow the practice to continue unchecked, at least until a court issues an advisory opinion specifically addressing the precise factual situation. In practice, the requirement of a neutral and detached magistrate would become functionally meaningless. The good faith exception would conceivably apply to a case where a warrant was not issued by a neutral and detached magistrate, was not supported by probable cause, and did not particularly describe the place to be searched or the items to be seized. By adopting such an exception, the Court will have functionally abdicated its control over compliance with the Warrant Clause.

5. A Reasonable, Good Faith Reliance Test Involves an Unworkable Standard With a Subjective Component and Complex Problems of Proof.

In light of the insurmountable procedural and substantive problems created by the proposed "reasonable, good faith" exception, it is understandable that Petitioner urges that "practical details" of the proposal would be "best left to future cases and initial resolution by lower courts." [P. Br. at 77] The problems raised in applying the proposed exception

⁴⁸See, e.g., *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327 (1979) (town justice who issued warrant and participated in search acted in role of "adjunct law-enforcement officer"); *Connally v. Georgia*, 429 U.S. 245, 250 (1977) (justice of peace who is paid only if warrant issued presumed not neutral and detached); *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971) (state attorney general who issued warrant not neutral and detached).

are far more than 'practical details,' and the wiser course is to consider the ramifications and the resulting inordinate expenditure of judicial resources before adopting such a sweeping proposal. The adoption of the exception would transform relatively limited hearings involving search warrant challenges into complex, time consuming evidentiary presentations.⁴⁹

Petitioner urges that the reasonable good faith exception should be an objective test, without spelling out how the test would work. While this proposal is doctrinally attractive, it is not workable or logically coherent. The essence of Petitioner's argument is that the exclusionary rule cannot deter an officer who believes in good faith that his conduct is within constitutional bounds. This assumes the officer's good faith belief; without it, he clearly can be deterred by the rule. It follows that the application of the proposal necessarily has a subjective component. This has been recognized in the cases adopting the rule and relied on by Petitioner. *See, e.g., United States v. Williams*, 622 F.2d 830, 840, 841 n.4a (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981) (exception applies only on showing of reasonable mistake and good faith belief conduct was legal); *United States v. Mahoney*, 712 F.2d 956, 960 (5th Cir. 1983)⁵⁰ ("The first inquiry under *Williams* is whether Mahoney's arresting officers had a subjective, good faith belief that their actions were legal.")⁵¹ The

⁴⁹A perhaps extreme example of such a hearing, under the facts involved in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981), is depicted in Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 418-23.

⁵⁰The *Mahoney* case observed that *Williams* did not address application of a good faith exception to search warrants. *Mahoney* applied the exception to a technically defective arrest warrant which, though supported by probable cause, failed to adequately describe the arrestee. In limiting its holding to that type of warrant defect, the *Mahoney* court noted:

We do not face here the fit of *Williams* to an arrest or search by officers holding a warrant found deficient for lack of probable cause. We leave for later the question of whether a good faith proviso to the exclusionary rule ought ever to tolerate an arrest or seizure without probable cause measured objectively.

United States v. Mahoney, 712 F.2d at 960 n.4.

⁵¹*See also United States v. Nolan*, 530 F. Supp. 386, 399 (W.D. Pa. 1981) ("Of course, any good faith exception must rest on a finding that the officer is in fact well trained."); *United States v. Wilson*, 528 F. Supp. 1129, 1132 (S.D. Fla. 1982) (applying exception based on finding of actual subjective good faith).

necessity of a subjective inquiry is also recognized by those state courts which have acknowledged the exception.⁵²

The commentators cited by Petitioner as advocates of the proposed exception uniformly acknowledge that its application would require a subjective inquiry. As Professor Ball admits, "[u]nder the good faith exception, evidence would be suppressed as illegal unless the officer could establish both a good faith belief and a reasonable basis for that belief."⁵³ Petitioner relies heavily upon the observations of Professor Kaplan, yet he ultimately rejects the proposed exception because it would necessarily include a subjective test, adding one more fact-worthing function subject to police perjury and unreviewable and untrustworthy findings by lower courts opposed to applying the exclusionary rule.⁵⁴

By focusing on a deterrent rationale aimed only at police officers, Petitioner hopes to limit inquiry to the objective reasonableness of an officer's understanding of the law. This formulation appears to lend itself to a simple application which would, no doubt, become the law as understood by the police officer on the street: if you have a search warrant, the search will be "legal." One immediate problem is how to exclude from the exception warrants based on conclusory affidavits as in *Nathanson*,

⁵²In *People v. Adams*, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 (1981) the court applied the exception to officers' reasonable reliance on an individual's apparent authority to consent to a search, but observed this reliance must also be in good faith, and police must make some inquiry into the individual's actual authority before reasonably relying on her consent. *Id.* at 9-10, 422 N.E.2d at 541, 439 N.Y.S.2d at 881. See also *Gifford v. State*, 630 S.W.2d 387, 391 (Tex. Crim. App. 1982) observing the exception is based on evidence of actual good faith.

⁵³Ball, *Good Faith and the Fourth Amendment*, 69 J. Crim. L. & Criminology, 635, 653 (1978). See also Carrington, *Good Faith Mistakes and the Exclusionary Rule*, CRIM. JUST. ETHICS, Summer-Fall 1982, at 35, 38 ("[I]t has been made patent that the test for admissibility must be two-pronged. First, the officer must allege that he believed he had probable cause to do whatever he did."); Schroeder, *Deterring Fourth Amendment Violators: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1420 (1981) (exception would not apply where officer "in bad faith oversteps the bounds of his authority").

⁵⁴Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1045 (1974).

and *Aguilar*, or other affidavits clearly lacking in probable cause,⁵⁵ such as the application to search Respondent Leon's house.⁵⁶ This requires an examination of whether the officer's reliance on the warrant was "reasonable."⁵⁷ In turn, this determination would require an extrapolation of existing law, and analysis of the extent to which governing principles are "predictably articulated." [See P. Br. at 81] The reviewing court must then examine the inferences a reasonably trained officer would draw.⁵⁸

This proposal does not address the standards used in determining whether a legal doctrine is "predictably articulated," or the question of to whom the law must be predictable. Similarly, there is no standard for defining a well-trained officer. Training standards for police vary wildly in different jurisdictions,⁵⁹ and the reasonable understanding and inferences drawn from current law by, for example, an FBI agent in Washington, D.C., will obviously differ from the understanding and inferences of a deputy sheriff in a remote rural setting. Definition of a reasonable understanding and inference simply adds a layer of complexity to search warrant litigation.

⁵⁵Justice White would exclude from the good faith exception warrants "so clearly lacking in probable cause that no well-trained officer could reasonably have thought that a warrant should issue." *Gates*, 103 S. Ct. at 2346 (White, J., concurring). This formulation begs the question of how such warrants can be objectively defined.

⁵⁶See *infra* discussion at 70-73.

⁵⁷This formulation assumes that it would be objectively reasonable for an officer to rely on certain warrants which cannot be supported by any substantial basis for a fair probability that the sought items will be found, while conceding that reliance on other warrants would *not* be objectively reasonable. This requires an arbitrary line to be drawn between "reasonably unreasonable" and "unreasonably unreasonable" warrants, an abstract and ethereal proposition.

⁵⁸See, e.g., W. LAFAVE, 1 SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 1.2, at 10 (1978).

⁵⁹The vast difference in training between federal and state, and city and rural police officers was documented in the 1975 PRESIDENTIAL COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE 120, 137:

Commission surveys show that there is substantial variance in the quality of police personnel in the United States. They indicate that, in general, law enforcement personnel meet their difficult responsibilities with zeal, determination, and devotion to duty. They also indicate that many actions of individual police officers and administrators are ill-conceived.

Another problem is determining what standard applies when the officer is from a different jurisdiction. Would, for example, a part-time volunteer deputy from a rural area be held to a higher standard when testifying in federal court in New York or Alaska, or to the different standard of understanding of current law prevalent in his home county? Where a state such as California has imposed stricter requirements of probable cause, what standard would apply to a state officer testifying in federal court or in another state jurisdiction?

Other issues would also need to be resolved. Would the objective standard of reasonableness be raised if the officer had conferred with one or more prosecutors prior to obtaining the warrant, as in this case? In order to encourage such internal review, should the reasonableness of the officer's reliance on a warrant be judged by an objective standard applicable to prosecutors? Is this standard any lower than actual probable cause? What standard for good faith reasonable reliance would apply where the affidavit purporting to establish probable cause is not attached to a warrant executed by an officer other than the affiant? Would it matter if the affiant intentionally had another officer execute the warrant because of doubts about the sufficiency of his factual showing of probable cause? Would it make a difference if the warrant application was previously rejected by a magistrate, or criticized by a prosecutor? Would it matter that the affiant brought his request to a magistrate he knew to be a "rubber stamp?" Hearings on these issues would necessarily require extended discovery and evidentiary presentations.

Moreover, a determination of the reasonableness of an officer's belief will necessitate inquiry not only into the predictability of the law's articulation in a given jurisdiction, but also require inquiry into the adequacy of an officer's training. The issues a court must address in this context are aptly detailed in Amicus Curiae Brief for National Legal Aid and Defender Association, at 21-22, *United States v. Leon*, No. 82-1771 (1983). This will require testimony from police supervisors in charge of the training and continuing education of line officers, adding yet another layer of complexity to motions to suppress, and imposing an unnecessary burden on the courts.⁶⁰

Despite Petitioner's ingenuous assertion to the contrary, the reasonable good faith exception will necessarily involve inquiry into an officer's subjective good faith. See, e.g., *United States v. Williams*, 622 F.2d at

⁶⁰See, e.g., Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 448.

840, 841 n.4a. The rationale for the exception is totally undermined by an officer who commits a sham mistake in bad faith which would nevertheless pass as "reasonable" under local standards. In that case, an officer may violate the Constitution and his own perceptions of what the Constitution requires, yet would Petitioner propose his "mistake" would be excused under an arbitrary objective standard of something less than probable cause? This would occur in any number of contexts. For example, the officer may believe that a warrant application which barely rises above the "bare bones" affidavit in *Nathanson* lacks any substantial basis for probable cause and reviewing courts might agree if they reached that question; yet the fact that a magistrate signed the warrant and that it contained various irrelevant facts that could be understood as "corroboration" would presumably render the officer's bad faith reliance on the warrant "objectively reasonable."⁶¹

The reasonable good faith exception would necessarily provide for subjective inquiry into issues of fraudulent behavior, such as intentional or reckless misstatements to the magistrate. *Franks v. Delaware*, 438 U.S. 154 (1978). Other areas similarly require subjective inquiry, such as where a reasonable warrant is obtained as a pretext for an overbroad search (*see, e.g., United States v. Rettig*, 589 F.2d 418 (9th Cir. 1978)), or for purposes of harassment of the subject of the search. The premium on the "reasonableness" of the officer's reliance on a warrant would extend this subjective inquiry even further. Allegations of magistrate shopping would undermine an officer's good faith in relying on an "objectively reasonable" warrant. A warrant obtained in bad faith by one officer might be "reasonably relied upon" by another officer who executes the search and is subjectively unaware of how the warrant was obtained. *Cf. Whiteley v. Warden*, 401 U.S. 560 (1971).

The inevitable time consuming subjective analysis will extend beyond the officer who obtains the warrant or performs the search. This will occur because any interpretation of good faith arguably consistent with the deterrence rationale of the exclusionary rule must extend beyond the indi-

⁶¹Similar abuses requiring subjective inquiry are easy to hypothesize. An officer might add catch-all phrases to the list of items to be seized which are beyond the scope of probable cause, or intentionally expand the description of the area to be searched, with fair assurance that his "mistake" will be viewed as "objectively reasonable." Similarly, he may use boilerplate language in the affidavit to show the credibility and reliability of an informant with no genuine belief in the accuracy of his boilerplate assertions.

vidual officer. The exception would be undermined by an institutional policy of "wait and see" whether courts will find it unreasonable for officers to be unaware of a Fourth Amendment standard before promulgating it to officers. *Cf. United States v. Johnson*, 457 U.S. 537, 561 (1982). The required inquiry would involve not only the adequacy of officer training, but also the good faith of those who set department policy.

Petitioner attempts to deal with these problems by defining them out of existence and blindly asserting that the proposed exception will simply focus on an objective test of reasonableness. As demonstrated above and acknowledged by virtually every court and commentator addressing the issue, a subjective inquiry is inherent to a good faith exception and simply unavoidable.

Justice White has observed that "[s]ending state and federal courts into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Illinois v. Gates*, 103 S. Ct. at 2347 (White, J., concurring) (citation omitted). Any fact-finding test aimed at an officer's subjective state-of-mind would present impossible problems of proof and could easily be manipulated by the witness. There is evidence that police already engage in a "perjury routine" at suppression hearings.⁶² The potential for increased misrepresentations is enormous. As one commentator explains: "[I]t is unlikely that the 'good faith' exception would do anything to reduce police perjury. To the contrary, it is likely that adoption of the 'good faith' proposal would create new varieties of testimonial alteration." Fyfe, *In Search of the "Bad Faith Search"*, 18 CRIM. L. BULL. 260, 262 (1982) (emphasis added).⁶³ The problem of

⁶²Loewenthal, *supra*, 49 UMKC L. REV. at 35. See also Sevilla, *The Exclusionary Rule and Police Perjury*, 11 SAN DIEGO L. REV. 839, 869 (1974). As an *amicus curiae* in support of the state in *California v. Krivda*, 409 U.S. 33 (1972), Illinois urged abolition of the exclusionary rule "because it causes the police to perjure themselves in hundreds of cases." Oral argument for the state of Illinois as *amicus curiae* in *California v. Krivda*, 12 CRIM. L. REP. (BNA) 4034, 4036 (1972). Potential avoidance of the rule by the availability of a good faith exception would only exacerbate this problem.

⁶³Fyfe points out that the danger of increased police perjury is caused not only by the good faith exception's necessary reliance on police testimony, but also by the risk of administrative discipline or civil liability faced by the officer as alternative deterrents under a good faith exception. *Id.* at 263-64.

reliance upon self-serving, untrustworthy, and generally uncontradicted police testimony is yet another obstacle to accurate fact-finding under a "reasonable good-faith reliance" exception.⁶⁴ It is doubtful that a police officer would ever testify he was not acting in good faith.⁶⁵

6. A Reasonable, Good Faith Reliance Exception Ignores *Stare Decisis* and Would Wreak Havoc With Settled Precedent.

Adoption of a reasonable, good faith exception to the exclusionary rule would unquestionably throw years of precedent into chaos. Any number of cases decided by this Court since *Weeks* would not have been decided under a good-faith exception, and will become of questionable validity.⁶⁶ Numerous other cases are premised on the reviewability of magistrate's decisions.⁶⁷ Other cases are in direct conflict with the proposed exception and would be directly overruled. A few examples are illustrative.

In *Whiteley v. Warden*, 401 U.S. 560 (1971), an officer obtained an arrest warrant based on a "bare bones," conclusory allegation that Whiteley and Daley had committed a crime. *Id.* at 563. News of the warrant was duly broadcast over a state police radio network to an officer in another county. That officer, in reliance on the radioed warrant information, arrested Whiteley and conducted a search incident to the arrest, which produced contraband. *Id.* The Court found that the warrant was invalid, because the magistrate was supplied no facts to support an independent finding of probable cause. *Id.* at 565. The Court acknowledged that the arresting officer was entitled to reasonably rely on the radio information that a presumably valid warrant had issued, but held the arrest and subsequent search to be illegal. *Id.* at 568-69. The arresting officer unquestionably acted in good faith, reasonable reliance on the arrest warrant. Yet failure to exclude the illegally seized evidence would insulate the unreasonable warrant from challenge.

In *Ybarra v. Illinois*, 444 U.S. 85 (1979), officers executing a search warrant at a tavern frisked patrons who were present at the time of the

⁶⁴See W. LAFAVE, SEARCH AND SEIZURE, *supra*, at 10 (Supp. 1983); Ball, *supra*, 69 J. CRIM. L. & CRIMINOLOGY at 655; Kaplan, *The Exclusionary Rule*, *supra*, 26 STAN. L. REV. at 1045; Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 447. See also *Franks v. Delaware*, 438 U.S. at 168.

⁶⁵In a similar context, Justice Harlan forecast that police who denied third-degree tactics would "lie as skillfully about warnings and waivers." *Miranda v. Arizona*, 384 U.S. 436, 505 (1966) (Harlan, J., dissenting).

⁶⁶See, e.g., cases cited *supra* p. 28.

⁶⁷See, e.g., cases cited *supra* note 6.

search. *Id.* at 88. Though unsupported by probable cause or articulable suspicion that the patrons were armed, the pat-down was specifically authorized by statute. *Id.* at 87 & n.1. Despite the officer's clearly "reasonable" reliance on the statute, the Court held the pat-down search unconstitutional, noting that it has always unhesitatingly held statutes purporting to authorize searches without probable cause to be "invalid as authority for unconstitutional searches." *Id.* at 96 n.11 (citing *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Sibron v. New York*, 392 U.S. 40 (1968); *Berger v. New York*, 388 U.S. 41 (1967)). Under a reasonable good faith exception, *Ybarra* would be decided wrongly, and this line of cases would be effectively overruled.

In *United States v. Johnson*, 457 U.S. 537 (1982) the Court retroactively applied the rule of *Payton v. New York*, 445 U.S. 573 (1980), that police must obtain a warrant before forcibly entering a suspect's home to make an arrest. *Id.* at 562. The government argued that the police had not violated any pre-existing, clearly articulated guidelines from past cases. The Court rejected this argument on the ground that it would reduce the retroactivity doctrine regarding new rulings "to an absurdity," *id.* at 560:

Under this view, the only Fourth Amendment rulings worthy of retroactive application are those in which the arresting officers violated pre-existing guidelines clearly established by prior cases. But as we have seen above, cases involving simple application of clear, preexisting Fourth Amendment guidelines raise no real questions of retroactivity at all. *Literally read, the Government's theory would automatically eliminate all Fourth Amendment rulings from consideration for retroactive application.*

Id. (emphasis added.) Application of a reasonable good faith rationale would accomplish precisely that — no Fourth Amendment ruling would be entitled to retroactive effect, *Johnson* would be overruled, and the entire law of retroactivity in the Fourth Amendment context would be changed.

Further examples of established Fourth Amendment precedent which would be undermined or overruled are virtually endless. If, for example, an officer reasonably relied on a warrant which was the unattenuated fruit of a prior illegal search, the doctrine of *Wong-Sun v. United States*, 371 U.S. 471, 484 (1963) would be substantially altered. *Cf. United States v. Grunsfeld*, 558 F.2d 1231, 1240 (6th Cir.), *cert. denied*, 434 U.S. 872, 1016 (1977) (warrant cannot be validly supported by evidence obtained in prior illegal search). An exception for good faith reasonable

reliance on a warrant would undermine cases holding that potential problems of the neutrality and detachment of a magistrate invalidate the warrant. *Cf. Connally v. Georgia*, 429 U.S. at 250; *Coolidge v. New Hampshire*, 403 U.S. at 449-53.⁶⁸ The good faith reliance rationale would similarly extend to and undermine the requirement of probable cause for electronic surveillance of private conversations. *Berger v. New York*, 388 U.S. 41 (1967). The rationale would also apply to precedent regarding administrative searches. *See, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (OSHA searches of employment facilities); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (administrative search of retail business). Clearly, disruption of seventy years of orderly precedent is a high price to pay for the resulting decrease in the amount of evidence suppressed from the government's case-in-chief at trial.

7. A Reasonable Good Faith Exception Would Leave No Alternative Remedy for Acknowledged Violations of the Fourth Amendment.

In the forty-eight years between *Weeks* and *Mapp*, states were free to devise an adequate disincentive to Fourth Amendment violations, but were unable to do so. As a result, the exclusionary rule is essential to keep the right of privacy secured by the Fourth Amendment from "remain[ing] an empty promise." *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). No new remedies have appeared since *Mapp*. As observed by retired Justice Stewart, a number of alternative remedies exist in theory, but:

[R]eality did not conform to theory. "Alternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next. In this case their statement is blinding. For there is but one alternative to the rule of exclusion. That is no sanction at all."⁶⁹

Civil liability for damages has long been rejected as an adequate deterrent. As pointed out by Justice Murphy thirty-five years ago, the disadvantages of a tort remedy include the difficulty in obtaining punitive damages, variations in state rules limiting damages, and "judgment-proof" officers. *Wolf v. Colorado*, 338 U.S. 25, 43-44 (1949) (Murphy, J., dissenting). Additional problems include the fear of reprisals from police, and the likelihood of jury prejudice in favor of officers. *See Mertens &*

⁶⁸Petitioner apparently concedes that this line of cases would be overruled by the good faith exception. *See* P. Br. at 62.

⁶⁹Stewart, *supra*, 83 COLUM. L. REV. at 1378-79 (quoting *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting)) (footnote omitted).

Wasserstrom, *supra*, 70 GEO. L.J. at 407. Generally, it is extremely difficult for the victim of an illegal search to finance or find a competent attorney to finance this type of litigation. See Stewart, *supra*, 83 COLUM. L. REV. at 1388. The magistrate who issues an unconstitutional warrant is immune from suit, *Stump v. Sparkman*, 435 U.S. 349, 363 n.12 (1978); see also *Harlow v. Fitzgerald*, 457 U.S. 800, 810-11 (1982). Where the reasonable, good faith exception applies, it follows by definition that police officers would also have a good faith defense to civil liability for their misconduct, particularly where a search warrant is involved. See *United States v. Ross*, 456 U.S. 798, 823 n.32 (1982). Similarly, injunctive relief would be unavailable. *Rizzo v. Goode*, 423 U.S. 362 (1976). A municipality would also be immune from suit unless the officer was implementing an official governmental policy by his unconstitutional conduct. *Monnell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

Civil litigation for damages or injunctive relief is a notoriously slow process which regularly drags on for years. Any alternative remedy must be swift if it is to act as a meaningful disincentive to improper police conduct.

Internal administrative discipline would also fail to prevent searches under warrants without probable cause. It is unrealistic to expect police departments to require a cross-check for the validity of every warrant obtained, or to order officers not to execute warrants which appear questionable. It is doubtful that law enforcement would seriously consider disciplining an officer who had been found to have "reasonably relied" on an unconstitutional warrant. It ignores the realities of the criminal justice system to believe that police will be criminally prosecuted for intentionally conducting unlawful searches and seizures.

To the extent any alternative remedy is available, it would only be invoked in cases of the most egregious misconduct which have generated significant publicity.⁷⁰ Yet the exclusionary rule would presumably be left intact as a deterrent to such misconduct under a good faith exception. The misconduct to which it would not apply is the same misconduct that would

⁷⁰It is the routine violations of the Fourth Amendment, rather than shockingly egregious incidents, which most require the exclusionary sanction. Shocking or violent intrusions can perhaps be curtailed by civil or criminal actions against the offending party, but prevention of the less egregious violations must depend on exclusion of the evidence thus obtained. See Kamisar, *A Defense of the Exclusionary Rule*, 15 CRIM. L. BULL. 5, 32-34 (1979).

be unremedied by alternative sanctions.⁷¹

If civil or administrative remedies were available, they would function more as personal sanctions instead of systemic disincentives against illegal activity. This personal liability, whether in damages or professional reproof, would certainly intimidate police from legal conduct within constitutional bounds to a far greater extent than the threat of suppressed evidence.

Even if alternative remedies were available, it is unclear who would pursue them and to what end. Litigants would likely find little incentive for pursuing other remedies. A criminal defendant generally has limited resources, and more immediate concerns than litigation of collateral issues.

Petitioner acknowledges by implication that no meaningful alternatives to the exclusionary rule exist, and suggests that development of alternative remedies has been inhibited by the continued existence of the rule. [P. Br. at 87] This position appears disingenuous in light of the Justice Department's support of pending legislation which would allow absolute civil immunity for law enforcement employees who violate the Fourth Amendment.⁷²

The proposed legislation would eliminate individual liability by substituting a right of action directly against the federal government with damages limited to one or two thousand dollars.⁷³ However, the government would be allowed to assert the good faith of the offending officer as a complete defense, eliminating *any* remedy for victims of illegal acts to which the proposed good faith exception to the exclusionary rule would apply.⁷⁴ Moreover, if the victim were convicted in the criminal case, the civil recovery, if any, would be limited to actual damages. Unless the illegal search involved physical violence or the destruction of property,

⁷¹If draconian civil remedies could effectively stop police misconduct, it is noteworthy that their "cost," in terms of lost evidence, would ideally be the same or greater than that of the exclusionary rule.

⁷²See, e.g., S. 283 and S. 829, 98th Cong., 1st Sess. (1983); H.R. 3142, 98th Cong., 1st Sess. (1983); S. 1775, 97th Cong., 1st Sess. (1982).

⁷³See, e.g., S. 829, *supra* (limits liquidated damages to \$1,000.00 or actual damages, which normally would be insignificant, and precludes punitive damages); H.R. 3142, *supra* (limits liquidated damages to \$2,000.00 or amount of actual damages and precludes punitive damages).

⁷⁴See, e.g., S. 1775, 97th Cong., 1st Sess. (1982) (proposed amendment to 28 U.S.C. § 2672(d)(1)).

the victim of the violation would recover nothing.⁷⁵

In light of the Justice Department's consistent support of these limitations on the availability of alternative remedies, it is understandable that Petitioner asserts that the absence of alternative remedies is "simply not a controlling consideration." In fact, in the absence of any meaningful alternatives to discourage Fourth Amendment violations, the proposed good faith exception would turn the Warrant Clause into a mere abstract ideal, and return the protections of the Fourth Amendment to an empty promise.

II.

IN THEORY, THE EVIDENCE SAVED FROM EXCLUSION BY THE REASONABLE GOOD FAITH EXCEPTION, IN THE CONTEXT OF THIS CASE, IS THAT SEIZED IN "REASONABLE" RELIANCE UPON A SEARCH WARRANT ISSUED WITHOUT ANY SUBSTANTIAL BASIS FOR PROBABLE CAUSE.

A. The Fourth Amendment Presumes That Evidence to Be "Saved" Would Be Unavailable.

While the probable cause requirement impedes the gathering of evidence and apprehension of suspected criminals, it embodies a trade-off for the competing value of privacy protected by the Fourth Amendment.⁷⁶ Each piece of evidence which is suppressed because it was seized in violation of the Fourth Amendment is evidence which the nation's founders determined should never have been seized by the government. Whatever evidence is lost by suppression (i.e., the "cost" of the exclusionary rule), and would presumably be saved by the proposed exception, is evidence that would not have been available if the government had complied with

⁷⁵See, e.g., S. 283, 98th Cong., 1st Sess. (1983); S. 751, 97th Cong., 1st Sess. (1981). Retired Justice Stewart has expressed "serious misgivings about such a limitation and question[s] whether these proposals could constitutionally supplant the exclusionary rule," since "the victim will have no incentive to bring suit and therefore no opportunity for a judicial determination of whether the fourth amendment has been violated." Stewart, *supra*, 83 COLUM. L. REV. at 1398.

⁷⁶See Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 390.

the law.⁷⁷ As Professor LaFave has aptly explained:

Those who drafted the Fourth Amendment may not have specifically contemplated the exclusionary sanction, but surely they expected the commands of the Amendment to be adhered to. "To the extent that the police obey the constitutional commands, the community foregoes such advantages as it might enjoy from evidence that can only be obtained illegally." It may fairly be said, then, as Justice Traynor once observed, that the cost argument was rejected when the Fourth Amendment was adopted.

1 W. LAFAVE, SEARCH AND SEIZURE, § 1.2, at 23 (1978) (footnotes omitted).⁷⁸

To the extent a reasonable, good faith exception would reduce the "cost" of the exclusionary rule and "save" otherwise unavailable evidence, the "saved" evidence is presumed to be unavailable because of compliance with the Fourth Amendment, and is only available by its violation.

B. The Exclusionary Rule Actually Results in the Loss of Few Convictions.

The "cost" of the exclusionary rule, measured in evidence suppressed and the inability to convict certain guilty defendants, has been substantially exaggerated. This is somewhat understandable, because the public can see evidence that is illegally seized and suppressed, yet is never aware of

⁷⁷As observed by Professor Kamisar, "It is not that [the criminal] is going free because the constable has blundered. It is because he would have gone free if the constable had complied with the law. It seems to me that if you put it that way, it comes out differently." *Exclusionary Rule Bills: Hearing Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary on S. 101, S. 751 and S. 1995, 97th Cong., 1st and 2d Sess., at 866 (1982)* [hereinafter cited as *Exclusionary Rule Hearings*].

⁷⁸See, e.g., *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law"); *United States v. Rabinowitz*, 339 U.S. 56, 67-68 (1950) (Black, J., dissenting) ("The framers of the Fourth Amendment must have concluded that reasonably strict search and seizure requirements were not too costly a price to pay . . .").

illegal police activities that are deterred by the rule,⁷⁹ nor of undeterred police abuses which never come to the attention of the court.⁸⁰

The availability of illegally seized evidence for use in court proceedings has been significantly increased in recent years as a result of the extensive limitations the Court has placed on the scope of the exclusionary rule. Perhaps the most sweeping limitation pertains to standing, making the exclusion remedy available only to one whose reasonable expectation of privacy was invaded by the illegal government conduct. *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

The dramatic effect that the standing limitation has on the incidence of evidence suppressions is demonstrated by the limited scope of the district court's suppression orders in this case. While Respondent Leon had standing to suppress items found in his home, that evidence is admissible against Respondents Sanchez, Stewart and Del Castillo. Moreover, under

⁷⁹See Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 394:

Despite the similarities between the probable cause requirement and the exclusionary rule, the disparate amount of public attention that their effects receive constitutes one important difference. The costs of the exclusionary rule are immediately apparent; its benefits are only conjectural. When courts apply the rule, they deprive law enforcement officers of incriminating evidence. In contrast, any police misconduct that would have occurred but for the deterrent effect of the suppression order is purely speculative. On the other hand, when the police do not search because they believe they lack probable cause, the public is not aware that potential evidence is lost. Further, in the unlikely event that the public becomes aware of a decision not to search, the benefits are apparent. An individual's privacy remains intact while the cost is merely conjectural; it cannot be known if evidence was in fact lost. Thus, although the cost of adhering to the requirements of the fourth amendment and the cost of applying the exclusionary rule are similar, the exclusionary rule "rubs our noses in it."

(Footnote omitted.)

⁸⁰Justice Jackson stressed the breadth of police illegality in his dissenting opinion in *Brinegar v. United States*, 338 U.S. 160, 181 (1948), cited with approval in *Elkins v. United States*, 364 U.S. 206, 217-18 (1960):

Only occasional and more flagrant abuses come to the attention of the courts . . . There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

the district court's order, evidence seized from 620 Price Drive,⁸¹ 7902 Via Magdalena,⁸² and of Stewart and Del Castillo's automobiles⁸³ is also admissible against Leon.⁸⁴

Limitations on the scope of the exclusionary rule also render illegally seized evidence available for use in a wide range of other contexts, from use in collateral proceedings to impeachment at trial. Application of the exclusionary rule is also already tempered by an objective reasonableness standard. The probable cause standard does not require certainty. The Fourth Amendment only requires a reasonable probability that the items to be seized will be found in the place to be searched.⁸⁵

⁸¹Evidence seized from this location and admissible against Respondent Leon includes letters to both Leon and Sanchez, receipts for weapons belonging to Leon and Sanchez, letters for Leon addressed to Sanchez, purchase papers for a Miami condominium in the names of Leon, Sanchez and Stewart, and various diaries and address books, as well as about an ounce of cocaine. This evidence and the contents of a safe deposit box discovered as a result of this search, were not suppressed as to Leon or Del Castillo. [J.A. 127-28]

⁸²The district court found that none of the Respondents had a sufficient expectation of privacy to suppress evidence seized from the alleged "stash pad" at 7902 Via Magdalena. [J.A. 128] This evidence includes scales and cocaine paraphernalia, the vast majority of the drugs seized in this case, and various documents including a receipt for Leon's shotgun. [J.A. 62-68]

⁸³Evidence seized from the automobiles is similarly admissible against Leon; only the automobile owner had standing to suppress evidence seized from any given automobile. [J.A. 129]

⁸⁴The suppression of evidence in this case typifies the exaggerated perception of the exclusionary rule's "cost." The suppression of pounds of drugs and numerous incriminating documents seems extreme at first glance. Yet because of standing considerations, the district court's suppression order was actually quite limited. In summary, evidence from Leon's home was not suppressed as to Sanchez, Stewart or Del Castillo. Evidence from 620 Price Drive was not suppressed as to Leon or Del Castillo; evidence from Stewart's car was not suppressed as to Leon, Sanchez or Del Castillo; evidence from Del Castillo's car was not suppressed as to Leon, Sanchez or Stewart, and evidence from 7902 Via Magdalena — including the bulk of contraband seized in this case — was not suppressed as to any defendant.

⁸⁵The determination of probability may be based upon rumors, hearsay, a suspect's prior record or other evidence inadmissible at trial. *See, e.g., United* (footnote continued on following page)

The scope of the exclusionary rule's application is also narrowly defined by the facts of a given search. For example, where evidence outside the authorized scope of a search warrant is seized, federal appellate courts have uniformly suppressed only the illegally seized evidence, while admitting evidence seized pursuant to the terms of the warrant. *See, e.g., United States v. Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978); *see also Andreson v. Maryland*, 427 U.S. 463 (1976). Increasingly, as an alternative to total suppression, courts have engaged in redaction of overbroad search warrants to preserve the admissibility of items seized pursuant to portions of the warrant supported by adequate probable cause or described with sufficient particularity. *E.g., United States v. Christine*, 687 F.2d 749, 759 (3d Cir. 1982).

The expanding limitations on the scope of the exclusionary rule, and the nature of those limitations, strongly indicate that the cost of the rule is far less than Petitioner asserts. This conclusion is uniformly supported by the available empirical analysis of the rule's application.

According to a Government Accounting Office study of 2,804 cases handled in 38 U.S. Attorney's offices in 1978, search and seizure problems

States v. Ventresca, 380 U.S. 102, 107-09 (1965); *Aguilar v. Texas*, 378 U.S. 108, 114 (1964); *Draper v. United States*, 358 U.S. 307, 311-13 (1959). The exclusionary rule has also been held inapplicable where a policeman makes a reasonable factual mistake. *See Kaplan, The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1044 (1974). *See, e.g., United States v. Robinson*, 414 U.S. 218 (1973) (hard object seized during traffic arrest and subsequent search for weapons held admissible, although actually a cigarette package containing heroin); *Hill v. California*, 401 U.S. 797, 803-04 (1971) (evidence from arrest based on probable cause admissible despite the fact that police arrested the wrong person due to a misidentification). The holding in *Hill*, based upon the "touchstone of reasonableness" under the Fourth Amendment, must not be confused with the good faith exception proposed by Petitioner. In *Hill* (as opposed to the instant case), the officers did have probable cause for an arrest. The Court specifically declined the opportunity to extend its rationale to that advanced by the Petitioner here:

[The police] were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time.

Hill v. California, 401 U.S. at 804.

accounted for only 0.4% of the arrests declined for prosecution by United States Attorneys, and evidence was suppressed in only 1.3% of the cases actually filed, half of which still resulted in convictions. COMP. GEN. REP. NO. GGD-79-45, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL PROSECUTORS 11, 13, 14 (1979) [hereinafter cited as GAO REPORT].⁸⁶ A recent commentary indicates that these figures, *combined*, amount to a loss of only 0.8% of all federal felony arrests.⁸⁷ Petitioner cites a 1982 study by the National Institute of Justice⁸⁸ that found that 4.8% of California criminal cases declined for prosecution were rejected because of search and seizure problems. NATIONAL INSTITUTE OF JUSTICE, THE EFFECTS OF THE EXCLUSIONARY RULE: A STUDY IN CALIFORNIA I (1982) [hereinafter cited as NIJ STUDY].⁸⁹ But the 4.8% figure is a percentage of *declined* arrests only, which is not a useful measurement.

A more valid measure of the exclusionary rule's effect is the percentage of all felony arrests that prosecutors reject because of illegal searches.⁹⁰ The data reported in the NIJ study shows California prosecutors rejected only 0.8% of their total cases for search and seizure reasons.⁹¹ Moreover,

⁸⁶Petitioner criticizes the GAO study for surveying federal prosecutors, most of whose cases, according to Petitioner, do not involve search and seizure issues. [P. Br. at 70 n.34] In fact, depending on the size of the office, between 69 and 88% of the defendants whose cases were accepted for prosecution were accused of crimes, such as firearms, narcotics, and immigration violations, that are "most susceptible" to search and seizure challenges. GAO REPORT, *supra*, at 7.

⁸⁷Davies, *What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: A Hard Look at the NIJ Study and a Review of Other Research*, 1983 AM. B. FOUND. RESEARCH J. (No. 3, forthcoming) [hereinafter cited as Davies, "Costs"].

⁸⁸The National Institute of Justice [hereinafter cited as NIJ] is the research arm of the United States Department of Justice.

⁸⁹The study's findings may have been rendered obsolete by California's recent abolition of independent state grounds for the exclusion of unconstitutionally obtained evidence. See CAL. CONST. art. I, § 28(d) (added by Initiative Measure, approved by the people, June 8, 1982).

⁹⁰This measure isolates the effect of the exclusionary rule itself and is not affected by the importance of other factors, such as witness non-cooperation or lack of evidence, the principal reasons for non-prosecution.

⁹¹Presented by police with 520,993 felony cases, prosecutors rejected 86,033 (16.5%), 4,130 of which (0.8% of the total arrests) were rejected for search and seizure reasons. The NIJ, which had the raw data available, NIJ STUDY, *supra*, at 10, omitted calculation of these percentages.

this figure is significantly higher than the national average, because at the time of the study California recognized a broad vicarious standing rule that enabled defendants not personally victimized by an illegal search or seizure to gain the benefit of exclusion. *Kaplan v. Superior Court*, 6 Cal. 3d 150, 161, 98 Cal. Rptr. 649, 656, 491 P.2d 1, 8 (1971). Additionally, at the time California protected a broader spectrum of privacy rights on independent state constitutional grounds. *See, e.g., People v. Krivda*, 8 Cal. 3d 623, 624, 105 Cal. Rptr. 521, 521, 504 P. 2d 457, 457 (1973) (search of trash cans protected by state constitution). The GAO study reports that 0.4% of rejected arrests were refused by prosecutors primarily because of illegal searches. GAO REPORT, *supra*, at 14. Since prosecutors refused 46% of all arrests, this means that federal prosecutors rejected 0.2% (i.e., 0.4% of 46%) of all arrests because of search and seizure problems. *See Davies, "Costs," supra*. The percentage is probably significantly lower today because of recent decisions of the Court such as the imposition of more rigorous standing requirements. By either measure, the percentage of cases not prosecuted because of search and seizure problems is not significant.

Having failed to establish that the exclusionary rule has any substantial overall effect on failures to prosecute arrests generally, Petitioner claims that California prosecutors rejected 30% of all felony drug arrests because of search and seizure problems. [P. Br. at 70] This was based on samples of only a few hundred cases from two of 21 Los Angeles County prosecutor's offices with atypically high search-rejection rates and is totally unrepresentative of the state as a whole.⁹² The statewide figure, according to the statewide data source used by NIJ, is less than *three* percent. *See Davies, "Costs," supra*. For example, data from the Bureau of California Criminal Statistics for 1980 shows that only 938 of 40,451 drug arrests, or 2.3%, were rejected because of illegal searches. *Davies, Do Criminal Due Process Principles Make a Difference?*, 1982 AM. B. FOUND. RESEARCH J. 247, 265.

While the impact of the exclusionary rule on the successful prosecution of drug cases is small, its role in cases involving violent crimes is virtually non-existent. Although the NIJ study does not report the percentages of violent crime arrests rejected because of illegal searches, it does show very small numbers of such rejections. NIJ STUDY, *supra*, at 12, Table

⁹²See Davies, "Costs," *supra*. *See also* Remarks of Hon. Shirley M. Hufstедler at American Bar Association Annual Meeting, reported at 33 CRIM. L. REP. (BNA) 2411 (August 17, 1983).

3. Using the same California source, it has been shown that prosecutors reject only 0.25% (less than 3 in 1000) of all non-drug arrests and even lower rates for violent crime arrests (e.g., only 0.06% or 6 in 10,000 homicide arrests). See Davies, "Costs," *supra*. A study of Washington, D.C., arrests conducted in 1974 by the Institute for Law and Social Research showed that of the over 5,000 persons charged with violent crimes, *no one* was released by the prosecution because of search and seizure problems.⁹³ According to 1980 data from the California Bureau of Criminal Statistics, in only about 0.1% of cases involving violent crimes were charges dropped for Fourth Amendment reasons. Davies, *Do Criminal Due Process Principles Make a Difference?*, *supra*, 1982 AM. B. FOUND. RESEARCH J. at 265.

As would be expected, when evidence is excluded, there appears to be some impact on convictions. Petitioner points to data indicating that conviction rates dropped from 84% in cases in which a suppression motion had been denied to 50% in cases in which a motion had been granted in whole or in part. [P. Br. at 71 & n.35]⁹⁴ These statistics are meaningless. The 50% figure is based upon a total sample of only 41 cases in which suppression motions were granted in whole or in part; only 19 of those cases resulted in dismissals or acquittals. The sample is too small to be statistically significant. This does show, however, that the suppression of evidence certainly does not mean that an accused will go free. To the contrary, more often than not a defendant who successfully had evidence suppressed was nevertheless convicted.

In fact, evidence is very rarely suppressed in court at all. Suppression motions were only filed in 10.5% of all federal criminal cases surveyed. GAO REPORT, *supra*, at 8. Of the motions filed, between 80 and 90% were denied. *Id.* at 10. Evidence was actually excluded in only 1.3% of the 2,804 cases studied; only 0.7% of the cases resulted in acquittal or dismissal after evidence was excluded. *Id.* at 9-11. A recent study of 7,500 felony prosecutions in Pennsylvania, Michigan, and Illinois found

⁹³Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L. REV. 559, 576 (1982).

⁹⁴It is unclear, however, how much of this difference is due to the exclusion of evidence and how much is due to other factors. The authors of the study admit as much. GAO REPORT, *supra*, at 13. Indeed, it is quite likely that counsel who managed to prevail against heavy odds on suppression motions are more energetic, competent, and successful than those who do not.

that suppression motions were filed in only 5% of the cases, and granted in only 0.7%. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RESEARCH J. (No. 3, forthcoming).

Petitioner also claims that the exclusionary rule tends in practice to "free the recidivist." [P. Br. at 71 n.36] Petitioner again relies on the conclusions of the NJ study that "[f]or most defendants, the arrest that ended in release because of the exclusionary rule was only a single incident in a larger criminal career." *Id.* In fact, the statewide data reported by NJ shows that perhaps as few as a quarter of all released arrestees had subsequent felony records. Even fewer had subsequent convictions, a better indicator of recidivism that NJ failed to use because of shortcomings in its data. NJ STUDY, *supra*, at 8.

It is impossible to determine from the NJ statistics whether, as Petitioner seems to claim, the exclusionary rule disproportionately favors "recidivists." The study included no comparative data on re-arrest rates for those with past involvement in the criminal justice system generally. The NJ data do show that fewer than 7% of rearrests of released defendants are for crimes against persons.

Petitioner also complains of the burden that the exclusionary rule places on the judicial system. [P. Br. at 74-75] In fact, the resources are modest when compared with the total amount of the resources used in the criminal justice system. The GAO study found that only 1.3% of available United States attorney's offices' time devoted to case prosecution was devoted to Fourth Amendment motions. GAO REPORT, *supra*, at 12.

Moreover, there is no indication that providing a good faith exception to the exclusionary rule will result in less judicial time being devoted to Fourth Amendment questions. On the contrary, adoption of a good faith exception, rather than simplifying Fourth Amendment law, is more likely to result in more complex and time-consuming evidentiary hearings. See *supra* discussion at 30-37. Equally important, given the low success rate of suppression motions currently filed, it is unlikely that the adoption of a good faith exception would have much impact on the number of motions filed. Indeed, it appears that a substantial proportion of illegal searches, especially in drug arrests, are so blatantly illegal that they would not be covered by the proposed exception. See Davies, "Costs," *supra*.

Finally, Petitioner asserts that the exclusionary rule "exact[s] an exceedingly high societal cost by lessening" public respect for the judicial system. [P. Br. at 71] The judiciary obviously should not be a barometer of public opinion. On the contrary, the exclusionary rule is a strong symbol

of the judiciary's unwillingness to encourage official lawlessness by allowing the use of illegally seized evidence.⁹⁵

What does potentially lessen public respect for the judicial system is the systematic fanning of public sentiment by dissemination of misleading claims about the exclusionary rule's effect similar to those advanced by Petitioner. Compared to the immeasurable number of illegal searches and seizures deterred by the exclusionary rule, the number of prosecutions dropped or lost, the amount of judicial resources consumed in litigating suppression motions and the other alleged "costs" of the Fourth Amendment are not substantial.

C. The Vast Preponderance of Evidence Seized Pursuant to Search Warrants Is Not Excluded.

The "cost" of the exclusionary rule, in terms of suppressed evidence, is less significant in the context of seizures pursuant to search warrants. A recent study of the warrant process in seven cities across the country, involving over 900 search warrants issued from January through June of 1980, found only 17 cases where motions to suppress were granted. VAN DUIZEND, *THE SEARCH WARRANT PROCESS*, *supra*, at 1-4, 2-41 (Table 2-23). The study also found that motions to suppress were filed in an average of only 38.6% of cases involving a search warrant and:

In few instances were these motions heard,^[96] much less granted, and we were able to discover only one instance in which a case was

⁹⁵As retired Justice Stewart recently wrote:

In some circles, the exclusionary rule has been accepted, however grudgingly, as the embodiment of our nation's commitment to ensuring that the fourth amendment's restraints on the power of government are zealously observed. Indeed, to some less-informed observers of the criminal justice system, it has replaced the fourth amendment itself as the source of prohibition against illegal behavior by law enforcement officials. Thus, when the effectiveness of alternative remedies is considered, we must bear in mind that the exclusionary rule is now part of our legal culture. Realistic appraisals of the effectiveness of the rule must, therefore, take into account the inevitable misperceptions that will arise in the minds of many that "repealing the rule" would signal a weakening of our resolve to enforce the dictates of the fourth amendment.

Stewart, *supra*, 83 COLUM. L. REV. at 1386.

⁹⁶This was apparently largely because many cases resulted in a guilty plea before the motion was heard. VAN DUIZEND, *THE SEARCH WARRANT PROCESS*, *supra*, at 4-9. In one city studied, a motion was considered "filed" simply by checking a box on an omnibus hearing form; in many instances, these "motions" were never heard. *Id.* at 2-40.

dismissed after a case in which a motion to suppress regarding a warrant was granted. Twelve of the seventeen cases in which a motion to suppress was granted nevertheless resulted in a conviction.

Id. at 4-8. Many police officers who were most involved in the warrant process said "they could not remember the last time they or a close associate were involved in a case in which a motion to suppress was granted or a prosecution dismissed because of a faulty warrant." *Id.* at 8-11.

This Court has not suppressed evidence obtained under an erroneously issued warrant for over fourteen years, since *Spinelli v. United States*, 393 U.S. 410 (1969). A survey of decisions of the District of Columbia Court of Appeals and the U.S. Court of Appeals for the District of Columbia found no recent cases holding a warrant insufficient other than those involving a knowing or reckless misstatement of material fact by the affiant.⁹⁷ Yet the rare case of evidence seized pursuant to a warrant unsupported by any substantial basis for a finding of probable cause, is the only occasion where the sweeping modification proposed for the exclusionary rule in this case would make any otherwise excluded evidence available for use in the government's case-in-chief.

The standards used by reviewing courts also compel the conclusion that little evidence seized under warrant is suppressed. The reviewing court does not substitute its judgment for that of the magistrate; it merely considers whether the initial judgment was reasonable and major deference is accorded the magistrate's initial determination of probable cause. In a marginal case, a search under a warrant may be sustainable when a warrantless search would be invalid, *United States v. Ventresca*, 380 U.S. 102, 106-08 (1965). This policy was strongly reiterated in *Illinois v. Gates*, 103 S. Ct. at 2331-32, where the Court stated a magistrate's finding must be upheld if, based upon the "totality of the circumstances," there is a "substantial basis" for a "fair probability" that the items to be seized will be found in a particular place.

A primary incentive for police and prosecutors to obtain a search warrant is to assure that the seized evidence will be admissible at trial. It follows that prosecutors will reject very few cases due to search and seizure problems where warrants were used. Hearings on motions to suppress involve limited, if any, testimony where a warrant was used; normally the motion is determined on the face of the warrant and supporting af-

⁹⁷Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 456.

fidavit.⁹⁸ Given the applicable standards of review and benefit of the doubt in marginal cases, findings that a warrant was issued without any substantial basis for probable cause in the totality of circumstances will be rare. Even in the few cases of an unsustainable warrant, doctrines of standing and redaction severely limit the potential that evidence will be suppressed.

D. The Proposed Exception Will Not "Save" a Significant Amount of Presently Excluded Evidence.

The purported "objective test" of reasonable good faith reliance on a search warrant would, at first glance, appear to operate as a blanket rule that absent evidence of bad faith, evidence seized pursuant to a search warrant is admissible. The standards for review of probable cause, together with present limits on the applicability of the exclusionary rule, indicate that most evidence seized under warrant is already admissible in the government's case-in-chief, as well as in the numerous contexts in which the rule is not applied. Obviously, the proposed reasonable good faith exception to the rule does nothing to "save" the admissibility of that evidence.

Presumably, the exception would not reach warrants obtained in bad faith such as fraud⁹⁹ or pretext.¹⁰⁰ It appears that proponents of the exception would also not extend the exception to merely conclusory affidavits such as those condemned in *Nathanson v. United States*, 290 U.S. 41, 46-47 (1933) and *Aguilar v. Texas*, 378 U.S. 108, 112-15 (1964),¹⁰¹ or cases

⁹⁸As explained *supra* pp. 30-37 the relative simplicity of suppression hearings regarding warrants would be transformed into a complex multi-layered inquiry of the officer's belief, training, and applicable standards for reasonable reliance under the exception proposed by Petitioner.

⁹⁹E.g., where the affiant intentionally or recklessly misleads the magistrate regarding material facts necessary to a finding of probable cause. See, e.g., *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

¹⁰⁰E.g., where officers obtain a warrant as a pretext to justify a search for other purposes. See, e.g., *United States v. Rettig*, 589 F.2d 418, 420-22 (9th Cir. 1978) (after a warrant request was denied by one magistrate, officers obtained warrant from a second magistrate for purported purpose of searching for marijuana; in fact, officers intended to use warrant in conducting investigation of a cocaine smuggling operation for which they had no probable cause).

¹⁰¹P. Br. at 65-66. See also Justice White's dissenting opinion in *Illinois v. Gates*, 103 S. Ct. at 2345.

"so clearly lacking in probable cause that no well-trained officer could reasonably have thought that a warrant should issue."¹⁰² As a result, the proposed "reasonable good faith" exception would save from exclusion, evidence seized under a warrant which lacked any substantial basis for a finding of probable cause, other than warrants issued or obtained in bad faith or warrants below an undefined — and undefinable — threshold of factual support. The only warrants lacking any substantial basis for probable cause are those based entirely on conclusory allegations, such as in *Nathanson* or *Aguilar*, or those that cross the limits beyond which a magistrate may not venture in issuing a warrant. Sustaining such warrants would require the Court to overrule *Illinois v. Gates*.¹⁰³

Under this analysis, the items seized from Petitioner Leon's house would still be excluded from evidence.¹⁰⁴ Yet short of wholly speculative or conclusory affidavits, the proposed "reasonable good faith reliance" test would apply only to a difficult-to-define category of warrants "reasonably" relied upon despite the absence of any reasonable basis for a finding of probable cause. The primary theoretical "benefit" of the proposed exception to the exclusionary rule — i.e., use of the fruits of a "reasonably unreasonable" search warrant — is certainly insignificant, particularly when measured against the undesirable ramifications of the proposal.

III.

A REASONABLE, GOOD FAITH EXCEPTION WOULD SUBSTANTIALLY DILUTE FOURTH AMENDMENT PROTECTIONS AND RENDER THE WARRANT CLAUSE MEANINGLESS.

The exclusionary rule exception for reasonable good faith reliance upon a search warrant focuses on the belief of the officer executing the warrant, as opposed to the issuing magistrate. As a result, the operative determination on which a search is or is not invalidated will no longer be the requirement of probable cause; instead the issue turns upon what the officer reasonably believed. Professor LaFave recently observed that

it is nothing short of nonsense to talk of a reasonable belief that there is probable cause, for the probable cause standard itself takes into account reasonable mistakes of fact. If mistakes of law were

¹⁰²*Illinois v. Gates*, 103 S. Ct. at 2346 (White, J., dissenting).

¹⁰³The *Gates* majority specifically reaffirmed its rejection of conclusory affidavits exemplified in *Nathanson* and *Aguilar*. *Gates*, 103 S. Ct. at 2332.

¹⁰⁴See *infra* discussion at 70-73.

also to be taken into account, then the law becomes whatever the officer thinks it is.¹⁰⁵

Petitioner no doubt argues that this is not a problem, because the law would merely be what the officer *reasonably* thinks it is. But that is precisely the problem. Warrants will no longer require even a substantial basis for probable cause; all that would be required is a "reasonable belief" that there must be some basis for a finding of probable cause, or what Professor Kamisar has aptly described as a "double dilution" of the probable cause standard.¹⁰⁶ In effect, reviewing courts would be sanctioning a "reasonably unreasonable" search based on the unprecedented and dangerous proposition that a reasonably well-trained police officer is not expected to obey the Fourth Amendment.¹⁰⁷

After *Gates*, magistrates need only find a substantial basis for a fair probability under the totality of the circumstances that items to be seized will be found in the place to be searched. This is, of course, a standard for review of the magistrate's decision. However, in practice this standard becomes that used by the magistrate in approving a warrant application. Once insulated from judicial review because of the reasonable reliance exception, the operative standard for issuance of a warrant will sink even below the "substantial basis" test, to whether the warrant would reasonably appear to be proper to a trained officer under prevailing legal standards, to the extent they are "predictably articulated." This transmutes probable cause into whatever will appear reasonable to a police officer.

¹⁰⁵LaFave letter, *Exclusionary Rule Hearings*, *supra*, at 793-94. The same reasoning was expressed in *Beck v. Ohio*, 379 U.S. 89, 97 (1964):

We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officer is not enough." *Henry v. United States*, 361 U.S. 98, 102 (1959). If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.

¹⁰⁶Kamisar, *Supreme Court Review and Constitutional Law Symposium*, *supra*, 52 U.S.L.W. at 2231.

¹⁰⁷A proper search warrant constitutes judicial authorization for police to conduct a search. A reasonable good faith exception would condone the search despite the finding that proper authorization was lacking. Such an unprecedented decision by this Court would undermine the basic notion of legality, by approving this search without probable cause.

This dilution of the probable cause standard is accelerated by the process of magistrate shopping. By this process, the requirements for a warrant become whatever it takes to get a signature from the most lenient magistrate. With no review of the decision, that standard is certain to fall far below probable cause. See *United States v. Karathanos*, 531 F.2d at 34.

As explained *supra*, pp. 29-30, the proposed exception would also logically allow for "reasonable" mistakes in the particularized description of places to be searched and items to be seized, and for the "reasonable good faith" reliance on warrants issued by magistrates in circumstances potentially undermining their neutrality. The only meaningful protection against these constitutional violations would be the officer's perception of reasonableness under an undefined objective standard.

Replacing the probable cause standard in its practical application with what is reasonable to a well-trained officer, given the facts as he perceived them, ignores the essential role played by the magistrate, i.e., the crucial insertion of a neutral and detached party into the warrant process. As explained in *Gerstein v. Pugh*, 420 U.S. 103 (1975):

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. *Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.*

Id. at 113-14 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)) (emphasis added).

The officer's perception of facts can and does differ from that of a detached magistrate. In many invalid warrants, the affidavit states only conclusions regarding an informant's credibility and the reliability of the informant's information. Since the affiant personally came to those conclusions, he will seldom believe the warrant is based on an unreasonable showing of probable cause. No matter how well-trained the officer is, his "reasonable" application of the law to a set of facts will be qualitatively different from a magistrate's determination. This, of course, is the very premise of the Warrant Clause.

It must be remembered that the purpose of the proposed exception is to eliminate the "costs" of the exclusionary rule — i.e., the litigation and occasional loss of evidence resulting from an acknowledged violation of the Warrant Clause. The resulting dilution of standards in executing the warrant requirement amounts to a substantive change in the Warrant

Clause, described by Justice Powell as "the very heart of the Fourth Amendment directive."¹⁰⁸ The Amendment would now read: "No Warrants shall issue except upon a showing of something perceived by a police officer as close to a substantial basis for probable cause, as irrefutably determined, reasonably or unreasonably, by a magistrate, regardless of his or her qualifications, neutrality, or the particularity of the warrant."

IV.

APPLICATION OF THE EXCLUSIONARY RULE TO THE FRUITS OF AN ILLEGAL SEARCH WARRANT, OFFERED AT A FEDERAL TRIAL IN THE GOVERNMENT'S CASE-IN-CHIEF, IS CONSTITUTIONALLY COMPELLED.

A. The Fourth Amendment Is Not Self-Executing and Presumes Enforcement at Trial in Federal Courts.

The Fourth Amendment is not self-executing, in that it merely announces the right of the people to be secure from unreasonable searches and seizures. If its protections are to be enforced, they require a remedy which will guarantee the rights granted by its language. The mere issuance of a warrant is insufficient; the immediate concerns that motivated our founders to adopt the amendment was the use of general writs of assistance issued upon mere suspicion. *Payton v. New York*, 445 U.S. 573, 583 & n.21 (1980).

The obvious remedy, as provided in *Weeks v. United States*, 232 U.S. 383, 398 (1914), is to render an unreasonable federal search a nullity by depriving the government of the primary use of its fruits — presentation of evidence in support of criminal charges in the case-in-chief at trial. This is consistent with the execution of other constitutional protections.¹⁰⁹ While the Fifth Amendment does not mention coerced confessions, such evidence is excluded as a matter of course, even where circumstances show the confession is trustworthy. See *Watts v. Indiana*, 338 U.S. 49, 50 n.2 (1949) and cases cited therein. The Sixth Amendment does not specify any remedy for deprivation of the rights of confrontation or counsel, but convictions obtained through such violations must be reversed.

¹⁰⁸ *United States v. United States District Court*, 407 U.S. 297, 316 (1972).

¹⁰⁹ "The sanction most frequently imposed in response to a constitutional violation is the sanction of nullification." Kamisar, *The Exclusionary Rule*, *supra*, 16 CREIGHTON L. REV. at 586 (quoting Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1532 (1972)).

Pointer v. Texas, 380 U.S. 400, 406-08 (1965); *Massiah v. United States*, 377 U.S. 201, 204-05 (1964). By the same token, the exclusionary rule, as applied to the government's case-in-chief in federal court, is essential to give meaningful life to the guarantees of the Fourth Amendment. Stewart, *supra*, 83 COLUM. L. REV. at 1404.

In proposing a good faith exception to the exclusionary rule, Petitioner asks the Court not merely to limit application of the rule, but to abolish it entirely in a set of circumstances involving an acknowledged violation of the Fourth Amendment. To the extent the Warrant Clause remains intact under this exception, *see supra* discussion pp. 29-30, Petitioner would have the Court, for the first time,¹¹⁰ remove the only meaningful disincentive to its violation from application in any judicial context. In effect, the Fourth Amendment prohibition of warrants without probable cause would be reduced to a mere ideal.

B. A Cost-Benefit Analysis Is Inappropriate Regarding Application of the Exclusionary Rule to Unconstitutionally Seized Evidence Offered as Part of the Federal Government's Case-in-Chief.

Petitioner rests the thrust of its argument on a cost-benefit analysis of application of the exclusionary rule. This approach has gained increasing favor with the Court in recent years when, for example, faced with collateral applications of the rule.

The proposition advocated by Petitioner is a qualitatively different application of the cost-benefit analysis. Here, the government would preclude any application of the rule, strictly upon an economic analysis. This "exception" differs dramatically from other limitations on the exclusionary rule, where peripheral uses of illegal evidence were allowed in reliance upon the central application of the rule to the government's presentation of its *prima facie* case against the accused. Without the central application under *Weeks*, the logic of cases limiting application of the rule collapses.

¹¹⁰As emphasized by Justice Brennan, in the context of application of the exclusionary rule in federal proceedings on direct review:

[N]o Justice has intimated that *Weeks* should also be overruled, at least in the absence of suitable and efficacious substitute remedies. . . . [The] test whether evidence should be suppressed in federal court has always been solely whether the Fourth Amendment prohibition against "unreasonable" searches and seizures was violated, nothing more and nothing less.

United States v. Peltier, 422 U.S. 531, 552 nn.10-11 (1975) (Brennan, J., dissenting) (citations omitted).

Petitioner asks the Court not simply to balance a marginal increase in deterrence against costs of the rule, but to condemn any use of the rule in this case because it requires strict compliance with an already flexible standard of probable cause, at a marginal cost to police efficiency. This application of the cost-benefit analysis was resolved and rejected when the Fourth Amendment was adopted, and the appropriate balance was determined to be the probable cause standard.¹¹¹

The cost-benefit analysis advocated by Petitioner is not applied by this Court in fashioning remedies for analogous constitutional violations. Involuntary confessions are uniformly excluded without balancing competing interests because the Fifth Amendment was violated, regardless of the trustworthiness of the statement. *Spano v. New York*, 360 U.S. 315, 320-21 (1959). Sixth Amendment violations such as deliberately eliciting uncounseled incriminating statements require exclusion of the statements. *United States v. Henry*, 447 U.S. 264, 273 (1980). The fact a statement which may be excluded is accurate or truthful does not require the application of a balancing test. Similarly, the balancing process is inappropriate in determining the propriety of the core application of the only meaningful enforcement of the Warrant Clause's probable cause standard. "The Warrant Clause of the Fourth Amendment is not dead language 'It is not an inconvenience to be somehow "weighed" against the claims of police efficiency.' " *United States v. United States District Court*, 407 U.S. 297, 315-16 (1972) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971)).

Adoption of a "reasonable, good faith" test to limit application of the exclusionary rule will not save the rule; rather, it presages rejection of the rule in its entirety. Here, the Court is asked to make a value judgment: where the deterrent effect of the exclusionary rule is open to criticism, despite the admitted absence of any alternative deterrent, should the Court simply eliminate application of the rule in favor of the expediency of admitted constitutional violations? Once the first step is taken, by adoption of a good faith exception, drawing the line becomes an arbitrary choice based on a moral judgment between constitutional protections and police efficiency. Opponents of the rule may draw the line at due process vio-

¹¹¹See, e.g., *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (probable cause standard provides balance between desire to prevent unreasonable invasions of privacy and attempt to give flexibility to law enforcement).

lations,¹¹² which ultimately threatens application of the exclusionary rule to the states under *Mapp*. But as a matter of *federal* law the line must be drawn at the Fourth Amendment, which does not contemplate a "reasonable" violation.

C. The Exclusionary Rule Does Act as an Important Disincentive to Fourth Amendment Violations.

Petitioner reasons that the exclusion of evidence where an officer relies on a search warrant in good faith cannot deter misconduct because it imposes a sanction on the wrong party. P. Br. at 61 & n.23. This argument misconceives the deterrent function of the exclusionary rule. The rule is not designed to "punish" an individual officer, nor is its goal the imposition of sanctions. Instead, the rule is a disincentive to constitutional violations which acts upon the criminal justice system as a whole. This misconception derives from the unfortunate use of the term "deterrence." As Professor Kamisar points out:

"Deterrence" suggests that the exclusionary rule is supposed to influence the police the way the criminal law is supposed to affect the general public. But the rule does not, and cannot be expected to, "deter" the police the way a criminal law is supposed to work. The rule does not inflict a "punishment" on police who violate the fourth amendment; exclusion of the evidence does not leave the police in a worse position than if they had never violated the Constitution in the first place.

Because the police are members of a structural government entity, however, the rule influences them, or is supposed to influence them, by "systemic deterrence", *i.e.*, through a department's institutional compliance with Fourth Amendment standards.

Kamisar, *supra*, 16 CREIGHTON L. REV. at 597 n.204. The underlying effect of the rule is not to repair damage done by a constitutional violation, but "to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it." *Stone v. Powell*, 428 U.S. 465, 492 (1976); accord *Elkins v. United States*, 364 U.S. 206, 217 (1960). Retired Justice Stewart, the author of the *Elkins* opinion,

¹¹²See, *e.g.* *Illinois v. Gates*, 103 S. Ct. at 2343 n.14 (White, J., concurring) (shocking invasions of privacy should invoke the exclusionary rule as a matter of due process, along with intentional and flagrant violations of the Fourth Amendment, but a "reasonable" violation should be "viewed through a different lens").

recently explained that

the exclusionary rule is not designed to serve a "specific deterrence" function; that is, it is not designed to punish the particular police officer for violating a person's fourth amendment rights. Instead, the rule is designed to produce a "systematic deterrence": the exclusionary rule is intended to create an incentive for law enforcement officials to establish procedures by which police officers are trained to comply with the fourth amendment because the purpose of the criminal justice system—bringing criminals to justice—can be achieved only when evidence of guilt may be used against defendants.

Stewart, *supra*, 83 COLUM. L. REV. at 1400 (footnote omitted).

This disincentive is accomplished in a number of ways. Aside from deterrence of the individual officer,¹¹³ the rule also encourages compliance with Fourth Amendment requirements by law enforcement officers generally. Yet the effect of the rule extends beyond this, in that it affects those who make police policy decisions resulting in institutional compliance with the Fourth Amendment. This process is now commonly referred to as "systemic" deterrence.¹¹⁴

The logical effectiveness of the rule as an incentive for compliance with Fourth Amendment mandates has long been recognized by the Court:

Despite the absence of supportive empirical evidence, we have assumed that the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it. More importantly, over the long term, this demonstration that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system.

¹¹³Of course, the rule does have an effect on the individual involved in an illegal search. One empirical study found a significant number of officers felt a personal loss when a court suppressed evidence they had seized. J. HIRSCH, *FOURTH AMENDMENT RIGHTS* 86-87 (1979). Surely the officers in this case will conduct more rigorous pre-warrant investigations in the future to assure a reasonable finding of probable cause, as shown by the hindsight desire for more corroboration expressed by the searching officer in *Gates* prior to this Court's decision. (See *supra* note 34).

¹¹⁴Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 394, 399-401.

We adhere to the view that these considerations support the implementation of the exclusionary rule at trial. . . .

Stone v. Powell, 428 U.S. 465, 492-93 (1976) (footnotes omitted).

The compelling logic of the exclusionary rule as a disincentive is illustrated by hypothesizing its absence where police rely on a search warrant. The determination of the magistrate would be insulated from later review, so police would be free to find the most lenient magistrates available, without fear of jeopardizing their cases by avoiding the more rigorous requirements imposed in a properly conscientious probable cause examination.¹¹⁵ It would become unnecessary to confer with a prosecutor,¹¹⁶ because the benchmark of a valid warrant procedure would simply be the officer's belief in its reasonableness. The requirement of thorough pre-search investigation to corroborate an unknown informant's tip would be sacrificed to a desire to discover at the earliest possible time what the search will disclose.

The extent of the deterrent effect of the exclusionary rule is not subject to empirical proof. The obvious problem is proving a negative,¹¹⁷ i.e., the extent to which police are not acting illegally as a result of the rule. It is impossible to observe and quantify cases where police are effectively deterred, and do not conduct an unconstitutional search. As the Court has

¹¹⁵A study of the warrant process in seven cities found that in many instances, police now do not seek out overly lenient magistrates because they fear the warrant would be vulnerable to a motion to suppress. As explained by one judge: "I believe that the average cop around here doesn't want his warrant to fall and they will, therefore, go to a judge who they believe knows the law and will give them a ruling that will stand up." VAN DUIZEND, *THE SEARCH WARRANT PROCESS*, *supra*, at 7-7. This disincentive against magistrate shopping is removed by a good faith exception.

¹¹⁶The affiant in this case had no assistance in preparing the warrant application, but did show it to three deputy district attorneys prior to taking it to the magistrate. [J.A. 103] While this evidences substantial doubt in the affiant's mind as to whether he had shown probable cause, internal review is a salutary practice. The incentive for this review is removed by application of a reasonable good faith exception. The proposed exception would actually discourage such review. The officer may fear that the "reasonableness" of his reliance on the warrant would be undermined at a suppression hearing if he had conferred with a prosecutor who expressed doubts about the sufficiency of the warrant application.

¹¹⁷*See Elkins v. United States*, 364 U.S. 206, 218 (1960).

noted¹¹⁸ and Petitioner concedes [P. Br. at 40-41], each study of the rule's deterrent effect is flawed and inconclusive.¹¹⁹

The Court has previously accepted a deterrence rationale despite the lack of empirical proof of its effectiveness.¹²⁰ In the context of capital

¹¹⁸*United States v. Janis*, 428 U.S. 433, 449-50 (1976).

¹¹⁹The principal study relied upon by critics of the exclusionary rule, conducted by Dallin Oaks, was based entirely on one city, Cincinnati, and simply studied arrests for possessory crimes before and after *Mapp*. His data on arrests from 1956 to 1967 is now hopelessly dated, and he admits his study was inconclusive. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 709 (1970).

A similar study by James Spiotto was similarly limited to one city, Chicago. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973). His data, based on the years 1960-1970, is similarly out of date. He examined the outcome of suppression motions before and after *Mapp*, on the theory that declining rates of suppression would show increased police sensitivity to Fourth Amendment rights. Spiotto found that suppression rates did not decline, but failed to take into account that Illinois had adopted its own exclusionary rule in 1923. Critique, *On The Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U.L. REV. 740, 754 (1974).

A more recent study which examined data from 19 large cities and estimates from 65, showed that fewer than 10% of suppression motions were granted and that the frequency of search warrants had increased. Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559, 562, 569 (1982). Canon concluded that the exclusionary rule "can and does have a very real, although hardly universal, deterrent effect on the police." Canon, *The Exclusionary Rule: Have Critics Proven That it Doesn't Deter Police?*, 62 JUDICATURE 398, 400 (1979).

¹²⁰Petitioner argues that the burden to prove the rule's deterrent effect is on those who seek its retention. [P. Br. at 39] While this may be true in derivative applications of the rule in collateral proceedings, see *Stone v. Powell*, 428 U.S. 465, 499-500 (1976) (Burger, C.J., concurring), the Court has consistently upheld the deterrent effect of the exclusionary rule in its core application at trial ever since *Weeks*. See, e.g., *Stone v. Powell*, 428 U.S. at 492-93. Petitioner now asks the Court to ignore its consistent approval of the rule's central application at trial over the past 70 years. In this context, it is clearly the Petitioner who must shoulder the heavy burden of proving that the proposed exception would not encourage the use of warrants without probable cause.

punishment, the Court found the data on its deterrent effect to be "inconclusive," but that it could nevertheless safely assume that for at least some potential murderers, the death penalty "undoubtedly is a significant deterrent." *Gregg v. Georgia*, 428 U.S. 153, 185-86 (1976).

Proof of the effectiveness of the exclusionary rule as a systemic incentive for stricter compliance with the Fourth Amendment does not rest on logical assumption alone. It is demonstrated by law enforcement response to judicial announcement of Fourth Amendment standards.¹²¹

For instance, as recently pointed out by retired Justice Stewart,¹²² Deputy Commissioner Leonard Reisman, the head of the New York City Police Department's legal bureau, explained at a post-*Mapp* training session:

"The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled that evidence obtained without a warrant—illegally, if you will—was admissible in state courts. So the feeling was, why bother?

"Well, once that rule was changed we knew we had better start teaching our men about it."

N.Y. Times, April 28, 1965, at 50, col. 1.

Commissioner Michael Murphy of New York echoed the same response:

I can think of no decisions in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this [application of the exclusionary rule] . . . I was immediately caught up in the entire program of reevaluating our procedures, which had followed the *DeFore* rule, and modifying, amending, and creating new policies and new instructions for the implementation of *Mapp* . . . Retraining sessions had to be held from the very top admin-

¹²¹As succinctly put by Professor LaFave:

[T]hat the exclusionary rule does have a deterrent effect is certainly reflected by such post-exclusionary rule phenomena as the dramatic increase in the use of search warrants where virtually none had been used before, stepped up efforts to educate the police on the law of search and seizure where such training had before been virtually nonexistent, and the creation and development of working relationships between police and prosecutors to ensure the obtaining of evidence by means which would not result in its suppression.

LaFave, *supra*, 43 U. PITT. L. REV. at 319 (footnotes omitted).

¹²²Stewart, *supra*, 83 COLUM. L. REV. at 1386.

istrators down to each of the thousands of foot patrolmen.¹²³

Similarly, when California adopted the exclusionary rule Los Angeles Police Chief William Parker stated that "[a]s long as the exclusionary rule is the law of California, your police will respect it and operate to the best of their ability within the *framework of limitations imposed by that rule*." W. PARKER, POLICE 117, 131 (1957) (emphasis added). Stephen Sachs, the Attorney General of Maryland, testified that "[i]n my state, *Mapp* has been responsible for a virtual explosion in the amount and quality of police training in the last twenty years." *Exclusionary Rule Hearings*, *supra*, at 41.

Response to the "framework of limitations" imposed by the exclusionary rule — i.e., the requirements of the Fourth Amendment—is evoked by each Fourth Amendment decision. FBI Director William Webster stated that "within 24 hours after a major case comes down affecting our right to do anything, the people in the field are informed of the significance of that case, with more details to follow." Webster, *Routine Methods Won't Stop the Leaders of Crime*, AMHERST, Summer 1981, at 21. As an example, he explained how agents within the Sixth Circuit were promptly ordered to stop surreptitious entries to install microphones under 18 U.S.C. § 2518 court orders, after such break-ins were ruled illegal in *United States v. Finazzo*, 583 F.2d 837, 841-42 (6th Cir. 1978), *vacated*, 441 U.S. 929 (1979). After that decision was vacated in light of *Dalia v. United States*, 441 U.S. 238 (1979), agents were sent instructions requiring them to continue to obtain court orders for surreptitious entries, despite the Court's ruling that such orders were not statutorily required. Webster, *supra*, at 21.

Another dramatic example of the systemic effect of the rule is the response of various police agencies to *Delaware v. Prouse*, 440 U.S. 648 (1979), which struck down random automobile stops for license checks without any articulable suspicion of criminal activity. *Id.* at 663. The District of Columbia Metropolitan Police had conducted such stops in good faith under the authority of a 1972 District of Columbia appellate decision. After *Prouse*, the Chief of Police immediately ordered officers to cease the practice, and the change in procedures is now reflected in the written departmental regulations imposed on every officer.¹²⁴

¹²³Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 TEX. L. REV. 939, 941 (1966).

¹²⁴Mertens & Wasserstrom, *supra*, 70 GEO. L.J. at 400.

In New Jersey, the county prosecutor immediately urged municipal police departments to adjust policies to the *Prouse* prescriptions, and forwarded regulations approved by the Attorney General of New Jersey. As a result, township police adopted written, constitutional procedures for traffic stops. *State v. Coccomo*, 177 N.J. Super. 575, 579 & n.1, 427 A.2d 131, 133 & n.1 (1980).¹²⁵

Similarly, the Delaware State Police responded to a lower court decision prior to *Prouse* but with the same holding. Within two months of that decision, the State Attorney General's Office had conferred with the state police legal officer, and a memorandum was disseminated to every unit in the state police system, describing the conduct prohibited by *Prouse*, and providing examples of the articulable suspicion required to justify a stop. Similar memoranda are provided to all officers regarding any court decision which affects police operations.¹²⁶

This example illustrates the fallacy of the argument that the "sanction" of suppression is disproportionate to the officer's misconduct. The officers in *Prouse* were acting in reasonable good faith, in that the Court's prohibition of random stops had not been predictably articulated. In this sense, the suppression of evidence may seem superficially disproportionate. Yet that view misconceives the rule's function to be akin to punishing the officer. Viewed in light of the rule's actual purpose and operation, regular police procedures in one of the most commonplace and potentially intrusive citizen encounters—traffic stops—were brought within constitutional bounds across the country, as the cost of one marijuana conviction.¹²⁷

¹²⁵Cases abound where traffic stops and subsequent seizures were upheld, not because of the reasonable good faith of the officers, but because police acted constitutionally, within the guidelines mandated in *Prouse*. See, e.g., *United States v. Prichard*, 645 F.2d 854, 856-57 (10th Cir. 1981); *People v. Carlton*, 81 Ill. App. 3d 738, 741-42, 402 N.E.2d 310, 314 (1980); *State v. Shankle*, 58 Or. App. 134, 138-39, 647 P.2d 959, 961-62 (1982); *People v. John BB.*, 56 N.Y.2d 482, 487-88, 438 N.E.2d 864, 867, 453 N.Y.S.2d 158, 161 (1982).

¹²⁶*Mertens & Wasserstrom, supra*, 70 GEO. L.J. at 400.

¹²⁷Another example which was witnessed by this Court is police response to *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), which required probable cause for random stops and full automobile searches near the Mexican border. *Id.* at 269. As a result of that decision, Border Patrol agents revised their procedures, stopping cars only on articulable suspicion, and then conducting only limited questioning. This practice was subsequently upheld, not on the basis of good faith, but because it was within the Fourth Amendment. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 n.6, 881-82 (1975).

This phenomenon is not limited to isolated cases. Similar responses to Fourth Amendment developments enforced by the exclusionary rule are common across the country. The Van Duizend study found numerous instances where officers were advised of recent court decisions or training programs were initiated in response to developments in search and seizure law. VAN DUIZEND, *THE SEARCH WARRANT PROCESS*, *supra*, at 5-2. Another empirical study involving interviews with chiefs of police in small towns in Illinois and Massachusetts found virtually all departments had policies in compliance with Fourth Amendment requirements as interpreted by this Court. S. WASBY, *SMALL TOWN POLICE AND THE SUPREME COURT* 86-91 (1976). A study involving police in sixty-five cities found that most police departments "changed policies in accord with major shifts in Supreme Court policies." Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for its Retention*, 23 S. TEX. L.J. 559, 567 (1982) (footnote omitted).

The Petitioner argues that application of the exclusionary rule in this case may chill legitimate police activities [P. Br. at 73], presumably by deterring police from obtaining warrants. As police are already aware, the law rewards the officer who uses a warrant, by the deference afforded the magistrate's decision, and the preference accorded warrants in marginal cases. *United States v. Ventresca*, 380 U.S. at 109. The Van Duizend study found that a significant incentive for the use of a warrant is that it will normally provide an opportunity to search a much broader area. Objects of the warranted search, such as "evidence of dominion and control," justify virtually unrestricted searches of a given place. VAN DUIZEND, *THE SEARCH WARRANT PROCESS*, *supra*, at 2-21, 5-8. Moreover, the risk of suppression resulting from a warrantless search is obviously substantially higher. Application of the exclusionary rule to warrants bears no relation to the incentive for a warrant where a warrantless search may be permissible.

While it may be argued that a good faith exception would increase incentives to utilize warrants, it would not increase incentives to comply with the probable cause requirement. The increased use of warrants, if any, would be for the wrong reasons—to capitalize on the opportunity to search while remaining insulated from later judicial scrutiny of probable cause.

D. Maintenance of the Disincentive Provided by Application of the Exclusionary Rule to This Case Is Constitutionally Compelled Because Its Removal Will Encourage Future Violations.

The imperative of judicial integrity, a major basis for the original adoption of the exclusionary rule; see *Weeks*, 232 U.S. at 392, has never been repudiated by the Court. Instead, judicial integrity is now perceived

to be vindicated by the exclusionary rule's discouragement of constitutional violations. See *United States v. Peltier*, 422 U.S. 531, 538 (1975); *Illinois v. Gates*, 103 S. Ct. at 2343 (White, J., concurring). As explained in *United States v. Janis*:

The primary meaning of judicial integrity in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, the inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose.

428 U.S. at 458 n.35 (citation omitted). This formulation imposes a constitutional mandate on the Court to avoid any incentive or encouragement of constitutional violations.

This approach is consistent with the Court's rejection of the argument that derivative use of illegally seized evidence constitutes a separate violation of a defendant's personal rights. In rejecting this argument in *United States v. Calandra*, 414 U.S. 338, 354 (1974), the Court observed that the Fourth Amendment violation was "fully accomplished by the original search without probable cause." The imperative of judicial integrity arguably may not focus on whether ramifications of the violation are exacerbated by derivative use of its fruits; it does, however, compel the Court to avoid encouragement of future violations. To this extent, the imperative of judicial integrity does overlap the deterrent function of the rule.

Given the accurate understanding of "deterrence" as the systemic effect of a disincentive, it follows that the Court must avoid a policy which would encourage government institutions, including but not limited to the police, to avoid or disregard the requirements of the Fourth Amendment. This mandates application of the exclusionary rule to the government's case-in-chief, because even if enforcing the rule would not deter police from violating the Fourth Amendment, "repealing the rule would positively encourage such unconstitutional activity."¹²⁸

¹²⁸P. Johnson, *New Approaches to Enforcing the Fourth Amendment* 4 (Working Paper, Sept. 1978) (quoted in *Kamisar, supra*, 16 CREIGHTON L. REV. 565, 662 (emphasis in original)). To demonstrate this point, retired Justice Stewart observed:

After the Court's opinion in *Alderman v. United States*, 394 U.S. 165 (1969), holding that fourth amendment protections are personal and could not be claimed by a person whose own constitutional rights

In this case, application of a reasonable good faith exception would positively encourage avoidance of the probable cause requirement by both police and magistrates. See *supra* discussion at 20-25).

E. The Disincentive Rationale of the Exclusionary Rule Is Not Limited to Police, and Must Include Magistrates.

The intended impact of the exclusionary rule has never been explicitly limited to police officers. The Court stated as early as *Weeks v. United States*, 232 U.S. 383, 394 (1914) that "the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, *acting under legislative or judicial sanction*." [Emphasis added].

Where a magistrate issues a warrant on less than probable cause, he has violated the Constitution just as surely as an officer who conducts an unreasonable warrantless search. The Fourth Amendment does not specify a particular branch of government to which it is directed. As retired Justice Stewart has stressed:

[I]f the fourth amendment's probable cause requirement is to be enforced, reviewing courts must have the authority on occasion to inform magistrates *in a meaningful way* that warrants based on something less than probable cause *are not to be tolerated*. . . . [In the absence of the exclusionary rule's application to warrants issued without probable cause,] there is no incentive—apart from a professional desire to comply with the fourth amendment—for that magistrate to refrain from repeating the same mistake in the future or from granting any colorable request for a search warrant.

Stewart, *supra*, 83 COLUM. L. REV. at 1403 (emphasis added).

Petitioner argues that there is no basis to assume that suppression of the fruits of a search because of an invalid warrant can have any impact on the issuing magistrate, who is an inappropriate target for the "punishment" of the exclusionary rule. [P. Br. at 58-59] This again misconceives the deterrent function as a punitive sanction. Application of the exclusionary rule allows the courts to review magistrate errors, thereby

had not been violated, " 'the government affirmatively counsel[ed] its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties.' " Stewart, *supra*, 83 COLUM. L. REV. at 1403 n.201 (citations omitted).

setting meaningful standards for probable cause determinations.¹²⁹ Moreover, it allows the focus of review to remain on the potential violation — absence of probable cause — instead of on the reasonableness of a police officer's belief that the warrant was valid.

V.

THE SEARCH OF RESPONDENT LEON'S HOME DOES NOT FALL WITHIN THE PROPOSED REASONABLE GOOD FAITH EXCEPTION.

Even if the exclusionary rule were not to apply where an officer reasonably relies on a search warrant in good faith, that exception would not properly apply to the search of Alberto Leon's house. Although this issue was not actively litigated in the trial court, the facts presented to the magistrate regarding Mr. Leon were such that no reasonable California police officer could conclude, under the prevailing articulated legal standards,¹³⁰ that probable cause to search Mr. Leon's house had been made out. The search was unlawful under *Aguilar-Spinelli* and would be unlawful under the standard articulated in *Gates*.

Petitioner concedes that the mere issuance of a warrant would not totally foreclose further inquiry into probable cause under the proposed reasonable good faith exception, and that the exception would not apply to warrants if it is entirely unreasonable to believe probable cause exists, or to conclusory warrants akin to *Aguilar*. [P. Br. at 65] The warrant in this case falls in this category, at least as it purports to authorize a search of the house on Sunset Canyon which was purportedly owned by respondent Leon.

The initial tip from a confidential informant of unknown reliability made no mention of Alberto Leon. Throughout the surveillance, officers never saw Mr. Leon, and the affidavit does not even intimate that he was ever present at the Price Drive house or the implied stash pad at Via Magdalena. Five days after surveillance of the Price Drive house began, an automobile registered to Respondent Del Castillo was seen at the house

¹²⁹As explained, *supra*, pp. 15-16, the threat of reversal also makes magistrates more conscientious in examining warrant applications.

¹³⁰The prevailing articulated standard at the time of the application to search Respondent Leon's house included what was commonly understood as the two-prong *Aguilar-Spinelli* test, which this affidavit blatantly failed to meet. Moreover, the affidavit also failed to meet the totality of the circumstances test set out in *Gates*.

for a brief visit. Research disclosed that while Del Castillo was on probation at some point between five months and two and a half years earlier, he gave a telephone number listed under Leon's name in Glendale as the name of his employer.¹³¹ During further surveillance four days later, Respondent Sanchez left the Price Drive house and visited the house owned by Leon on South Sunset Canyon in Burbank — a different address than Glendale. Sanchez stayed for twenty minutes and left with a small package. Leon was not seen at this or any other time, and we do not know what the package contained, which could be anything from a borrowed book to homemade cookies. Three weeks later,¹³² an unidentified visitor left the Price Drive house some time after 10:15 and drove to Leon's house on Sunset Canyon;¹³³ at the time a car registered to Leon was parked at the house. Shortly after midnight the unidentified male left and returned to Price Drive. [J.A. 49]

This is the extent of facts regarding Leon obtained through police surveillance. The only other information regarding Respondent concerned two other entirely uncorroborated and stale informant tips.¹³⁴ One was a statement by a co-defendant after Leon was arrested in April of 1980.¹³⁵ While in jail, the co-defendant claimed Leon was connected to the "Cuban Mafia" and drug importation. The co-defendant was obviously not a mere citizen informant, and no allegation of her credibility, reliability, or the source of the information, nor corroboration of her statement is mentioned in the affidavit.

¹³¹It is doubtful that Del Castillo was facetiously listing the number of a criminal partner, because he gave the number to the probation department.

¹³²No activity relating to Leon was reported in the interim.

¹³³The affidavit does not establish that Leon lived, or was even present, at the Sunset Canyon house. We only know that he owned the house and that an automobile parked out front was registered in the names of Leon and a Dinorah Jimenez, about whom we are told nothing. [J.A. 49] Given information connecting Leon to an address in another town, Glendale, as recently as a month earlier, it is very possible that Ms. Jimenez was a friend of Leon's and was the sole occupant of the Sunset Canyon house.

¹³⁴One other piece of information of negligible consequence was that over 18 months earlier, Leon was arrested for possession of a "small quantity" of quaalude tablets in another city, but there was no indication he was ever convicted of this offense. [J.A. 40]

¹³⁵The District Attorney declined prosecution of Leon at that time, and someone else was charged and convicted of possession of the drugs seized at the time of the arrest. [J.A. 39]

The other "tip" came via the Glendale police, who said that on an unspecified date during or before July 1981, an unidentified and presumably unproven informant told them that at some other unspecified date Leon had quaalude tablets in his Glendale residence.¹³⁶ There was no information listed as to the informant's veracity, the reliability of his or her information, or the basis of his or her knowledge. Similarly, there was no corroboration of the tip; the only additional fact is that the unknown informant would not attempt to buy drugs from Leon. [J.A. 40]

In summary, the warrant application showed two stale,¹³⁷ wholly uncorroborated and conclusory tips, akin to *Aguilar*, and the most peripheral connection between people surveilled at Price Drive and a house owned by Leon which had never been mentioned in a prior tip. These facts do not come even close to probable cause to search the Sunset Canyon house¹³⁸ and under the predictably articulated requirements of probable cause, it was not reasonable for a well-trained officer to believe that probable cause to search that house existed. At the most, the information merely gave rise to a suspicion that Respondent Leon was associated with individuals who may have been involved in criminal activity. There were no facts establishing probable cause to believe that evidence would be found at the Sunset Canyon residence.

Even under the flexible reasonableness standard set out in *Gates*, no well-trained officer could reasonably believe that the above facts constitute a "substantial basis for concluding" that the evidence to be seized could be found in the Sunset Canyon house. Otherwise, it would be "reason-

¹³⁶Significantly, neither of these unverified tips made any mention of the house on Sunset Canyon in Burbank which was ultimately searched.

¹³⁷The tips, provided in April of 1980 and on an unspecified date prior to July 1981, are impermissibly stale. See *Sgro v. United States*, 287 U.S. 206, 210 (1932).

¹³⁸The facts in support of the warrant to search Leon's house do not come remotely as close to probable cause as those in *Spinelli v. United States*, 393 U.S. 410, 413-14 (1969). In *Spinelli*, officers personally observed Spinelli going in and out of the target apartment, and were given two telephone numbers from an allegedly reliable informant. The numbers were corroborated as belonging to phones in the apartment, which the informant said was used for illegal gambling. In the instant case, no informant was known or claimed to be credible, there was no information about how either informant got his information, neither informant referred to the Sunset Canyon house, and the officers never actually saw Leon.

able" for an officer to believe that a tip from an informant who is not even alleged to be credible nor to have reliable information,¹³⁹ is sufficiently corroborated if the subject of the tip has been charged with a similar crime in the past, regardless of whether he was convicted and regardless of the lack of nexus between the tip and the place to be searched. This conclusion not only does not comport with the law; it does not come close to an objectively reasonable understanding of "predictably articulated" legal principles as perceived by a reasonable police officer.

This conclusion is even more compelling in light of the "predictably articulated" law regarding warrants prior to *Gates*. California courts had uniformly interpreted the rule of *Aguilar-Spinelli* to be the "two-pronged" test, requiring evidence that an informant was credible, and that his information was reliable. *Illinois v. Gates*, 103 S. Ct. at 2327.¹⁴⁰ Any well-trained California officer would reasonably have known that as to the search of the Sunset Canyon house, the facts in the affidavit satisfied neither prong of the *Aguilar-Spinelli* test for either of the informants relating to Leon, and that there was not any adequate corroboration of the tips.¹⁴¹

VI.

SINCE THE SEARCH OF ALBERTO LEON'S HOUSE DOES NOT FALL WITHIN THE PROPOSED REASONABLE GOOD FAITH EXCEPTION, *ILLINOIS V. GATES* SHOULD NOT BE APPLIED RETROACTIVELY TO THAT SEARCH.

The question for which *certiorari* was granted presumes that the search warrant issued in this case was defective for lack of probable cause. Petitioner specifically declined to seek review of the ruling that probable

¹³⁹Contrast *Aguilar v. Texas*, 378 U.S. at 120 (affiant stated he had "reliable" information from a "credible" informant).

¹⁴⁰See, e.g., *People v. Smith*, 17 Cal. 3d 845, 850, 132 Cal. Rptr. 397, 400, 553 P.2d 557, 560 (1976); *People v. Hamilton*, 71 Cal. 2d 176, 179, 77 Cal. Rptr. 785, 787, 454 P.2d 681, 683 (1969) (citing the *Spinelli* reference to "Aguilar's two-pronged test"); *People v. Scoma*, 71 Cal. 2d 332, 337, 78 Cal. Rptr. 491, 494-95, 455 P.2d 419, 423-24 (1969); *People v. Cooks*, 141 Cal. App. 3d 224, 293, 190 Cal. Rptr. 211, 261 (1983).

¹⁴¹California courts have consistently held that frequent visits by suspected narcotics offenders, prior criminal records and conduct consistent with innocence are insufficient corroboration of informants' tips. See, e.g., *Alexander v. Superior Court*, 9 Cal. 3d 387, 394, 107 Cal. Rptr. 483, 488, 508 P.2d 1131, 1136 (1973); *Halpin v. Superior Court*, 6 Cal. 3d 885, 895, 101 Cal. Rptr. 375, 381-82, 495 P.2d 1295, 1301-02 (1972).

cause was lacking in this case. [Pet. at 9 n.10] In light of this and the fact that probable cause to search was lacking under the standards set out in *Gates*, this Court need not reach the issues of whether any new standards were announced in *Gates*, and whether such standards should be retroactively applied to facts occurring prior to that decision.

Moreover, if the Court decides to apply a reasonable good faith exception to search warrants lacking in probable cause, that exception should only be applied prospectively and not to the instant case. See *U.S. v. Peltier*, 422 U.S. 531 (1975).

Conclusion.

For each of the above reasons, the order of the District Court should be affirmed.

November, 1983.

Respectfully submitted,

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APPENDIX.

State Statutes Providing for Search Warrants Issued by Non-Attorneys.

ALABAMA*	ALA. CODE § 12-17-251(c)(1) (Supp. 1982).
ALASKA	ALASKA STAT. §§ 22.15.100(4), 22.15.160 (1982); ALASKA CRIM. R. 37(a)(1) (1978).
ARIZONA	ARIZ. CONST. art. 7, § 15 (Supp. 1983); ARIZ. REV. STAT. ANN. § 11-402 (1977); ARIZ. REV. STAT. ANN. § 13-3911 (Supp. 1983).
ARKANSAS	ARK. CONST. art. 7, § 41 (1947); ARK. STAT. ANN. § 43-205(A), -1405(5) (1977); ARK. R. CRIM. PROC. 1.6(c) (1977).
COLORADO	COLO. REV. STAT. §§ 13-6-106(1)(b), -203(3), (5) (1973 & Supp. 1982); COLO. REV. STAT. § 13-10-106 (1973 & Supp. 1982); COLO. REV. STAT. § 16-3-301(1) (1978).
DELAWARE	DEL. CONST. art. IV, §§ 2, 29-30 (1974 & Supp. 1982); DEL. CODE ANN. tit. 11, § 2304 (1979).
FLORIDA	FLA. STAT. § 34.021 (Supp. 1983); FLA. STAT. § 933.01 (Supp. 1983).
GEORGIA	GA. CODE § 24-402 (Supp. 1982); GA. CODE § 27-303(a) (1981).
IDAHO	IDAHO CODE §§ 1-2206, 1-2208(3)(c) (Supp. 1983).
ILLINOIS*	ILL. CONST. art. 6, § 11 (Smith-Hurd 1971) (Transition Schedule § 4(b) (1970)); ILL. ANN. STAT. ch. 38, § 108-3 (Smith-Hurd 1980).
INDIANA	IND. CODE ANN. §§ 33-10.1-3-2, 35-33-5-1 (Burns Supp. 1983).
IOWA	IOWA CODE ANN. §§ 602.52, 602.60 (West Supp. 1983); IOWA CODE ANN. § 808.4 (West 1979).
KANSAS	KAN. STAT. ANN. §§ 20-337, 22-2502 (1981).
KENTUCKY	KY. CONST. § 100 (1970); KY. REV. STAT. § 15.725(4) (Supp. 1982); KY. R. CRIM. P. 13.10(1) (1983).
MASSACHUSETTS	MASS. ANN. LAWS ch. 218, § 33 (Michie/Law. Co-op. (Supp. 1983)).

MICHIGAN	MICH. COMP. LAWS ANN. §§ 600.8507, 600.8511(d) (1982).
MINNESOTA	MINN. STAT. ANN. § 626.06 (1983).
MISSISSIPPI	MISS. CONST. art. 6, § 171 (Supp. 1982); MISS. CODE ANN. § 99-15-11 (1972).
MISSOURI	MO. ANN. STAT. §§ 479.010, 479.020.3, 479.100, 542.266.2 (Vernon Supp. 1983).
MONTANA	MONT. CODE ANN. §§ 3-10-202, 46-1-201, 46-5-202 (1983).
NEBRASKA	NEB. REV. STAT. § 24-519(4) (1979).
NEVADA	NEV. REV. STAT. §§ 4.010, 169.095, 179.025 (1981).
NEW HAMPSHIRE	N.H. REV. STAT. ANN. § 502-A:3 (1968); N.H. REV. STAT. ANN. § 595-A:1 (1974).
NEW JERSEY*	N.J. STAT. ANN. § 2A:8-7, :8-15 (West 1952); N.J. CRIM. PROC. R. 3:5-3 (1982).
NEW MEXICO	N.M. STAT. ANN. § 35-14-2.A, -3 (1978).
NEW YORK	N.Y. CONST. art. 6, § 20(c) (McKinney 1969 & Supp. 1982); N.Y. CRIM. PROC. LAW § 10.10 (McKinney 1981); N.Y. CRIM. PROC. LAW § 690.05(1) (McKinney 1971).
NORTH CAROLINA	N.C. GEN. STAT. § 7A-171.2(b), -180(5), -273(4) (1981).
NORTH DAKOTA	N.D. CENT. CODE § 27-07.1-07 (Supp. 1983); N.D. CENT. CODE § 29-29-01 (1974); N.D. CENT. CODE § 40-18-01 (Supp. 1983).
OHIO*	OHIO REV. CODE ANN. § 1907.051 (Baldwin 1982); OHIO REV. CODE ANN. § 2933.21 (Baldwin 1979).
OKLAHOMA	OKLA. CONST. art. 7, § 8(h) (West 1981); OKLA. STAT. ANN. tit. 22, § 162 (West Supp. 1982); OKLA. STAT. ANN. tit. 22, § 1221 (West 1958).
OREGON	OR. REV. STAT. § 51.240 (1979); OR. REV. STAT. §§ 133.525(1), 133.545(1) (1981).
PENNSYLVANIA	PA. STAT. ANN. tit. 42, § 3101(a) (1981); PA. R. CRIM. PROC. 3(j), 2001 (1981).
SOUTH CAROLINA	S.C. CODE ANN. §§ 17-13-140, 22-1-10 (Law. Co-op 1976).
SOUTH DAKOTA	S.D. CODIFIED LAWS ANN. § 16-12A-13 (1979); S.D. CODIFIED LAWS ANN. §§ 23A-35-2, -45-9(3) (1974 & Supp. 1983).

TENNESSEE	TENN. CONST. art. 6, § 4 (1980); TENN. CODE ANN. § 16-15-201 (Supp. 1983); TENN. CODE ANN. §§ 40-5-102, -6-101 (1982).
TEXAS	TEX. CONST. art. 5, § 15 (Vernon 1955); TEX. CODE CRIM. PROC. ANN. art. 2.09, 18.01(a) (Vernon Supp. 1982).
UTAH	UTAH CODE ANN. §§ 77-1-3(4), 77-23-1, 78-5-1 (1982 & Supp. 1983).
VIRGINIA	VA. CODE §§ 19.2-37, -45(2) (1983).
WASHINGTON	WASH. REV. CODE ANN. § 2.20.020 (Supp. 1983); WASH. REV. CODE ANN. § 3.04.040 (1961); WASH. REV. CODE ANN. §§ 10.79.010, 10.79.015 (1980).
WEST VIRGINIA	W. VA. CODE § 50-1-4 (1980); W. VA. CODE § 62-1A-3 (1977).
WYOMING	WYO. STAT. §§ 7-3-501, -7-101 (1977); WYO. ST. J.P. ADMIN. R. 2 (1983).

* Denotes states with grandfather clause provisions permitting existing non-attorney magistrates to issue search warrants.

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ALEXANDER L. STEVAS,
CLERK

No. 82-1771

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS SANCHEZ, STEWART AND DEL CASTILLO

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1771

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL., RESPONDENTS

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR RESPONDENTS SANCHEZ, STEWART AND DEL CASTILLO

Respondents Armando Lazaro Sanchez, Patsy Ann Stewart and Ricardo Albert Del Castillo submit this brief on the merits.

STATEMENT

Respondents adopt the Statement set forth by petitioner with the following modifications and additions:

1. The district court rejected arguments by respondents that standing should be determined by California and federal law, and that under California's vicarious standing doctrine respondents could move for exclusion of all illegally-seized evidence (J.A. 124, 127). In applying strictly federal law, the court made the following rulings pertaining to the respondents' standing: respondent Sanchez could exclude evidence seized from only one of the three residences searched and from no automobiles; respondent Stewart could challenge evidence seized from the same one of three residences and her own automobile; and respondent Del Castillo had standing to contest no residence searches and sim-

ply the search of his own automobile (J.A. 127-29).

2. The prosecution raised the good-faith issue the day following the district court's ruling on the suppression motions (J.A. 139-40). The issue was not litigated below. In fact, the court initially denied respondents' motion to reveal the identity of the informant and then refused attempts to question Officer Rombach concerning his interactions with the informant (J.A. 97-98). In retrospect, these and similar inquiries seem critical to an assessment of whether the officer acted in reasonable good faith in applying for the warrant (see pages 46-48 *infra*).

SUMMARY OF ARGUMENT

1. For nearly seventy years, the government has been barred from proving a defendant's guilt at a federal criminal trial with evidence seized by federal law enforcement officers in violation of the Fourth Amendment. Through its good-faith proposal, the government now urges this Court to permit use of such evidence if the unconstitutional seizure was due to a reasonable mistake of the police officer. Petitioner contends that since the exclusionary rule is judicially-created, not constitutionally-compelled, this Court can so modify application of the rule if warranted by a cost-benefit analysis.

We submit that where the government seeks to prove guilt at trial with illegally-seized evidence, the exclusionary rule is constitutionally-compelled. First, the rule is an "essential part" of the Fourth Amendment (*Mapp v. Ohio*, 367 U.S. 643, 656 (1961)) and is mandated to give meaning and protection to the Amendment's ban against unreasonable searches and seizures; for, without the rule, the Fourth Amendment "... is of no value, and ... might as well be stricken from the Constitution." *Weeks v. United States*, 232 U.S. 383, 393 (1914). Furthermore, the exclusionary rule has also been given constitutional basis in the Fifth Amendment privilege against self-incrimination, when considered in conjunction with the Fourth Amendment. Commencing with its decision in *Boyd v. United States*, 116

U.S. 616 (1886), this Court has held that when evidence is seized in violation of the Fourth Amendment, exclusion of the evidence at trial is mandated to protect the accused's privilege against self-incrimination.

In addition, the exclusionary rule is not only rooted in the Fourth and Fifth Amendments, it is also a constitutionally-compelled remedy for Fourth Amendment violations. The rule is "a clear, specific and constitutionally required — even if judicially implied — deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words.'" *Mapp*, 367 U.S. at 648. Indeed the exclusionary rule is essential to enforcement of the Fourth Amendment and is the only remedy able to effectively deter police from violating it.

Finally, decisions of this Court have directly held that the good faith of the police officer cannot excuse the Fourth Amendment requirement of probable cause. Otherwise, "... the protections of the fourth amendment would evaporate, and the people would be secure . . . only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964). Moreover, the reasoning and holdings of other decisions of this Court are wholly inconsistent with a good-faith proposal.

2. Although the good-faith proposal is couched as a mere exception to the exclusionary rule, particularly in warrant cases, the proposal will actually serve to obliterate the rule. In the process, the good-faith proposal will threaten the very survival of the Fourth Amendment itself in four key respects.

a. The good-faith proposal would erode the probable cause standard in warrant cases by countenancing the regular use of evidence seized without probable cause. Under the proposal, except in egregious cases, the only qualification for admission of evidence at trial would be the existence of a warrant; no longer would the requirement that the warrant be based on probable cause be determinative. This would announce to our citizenry that the words and meaning of

the Fourth Amendment are no longer sacred, and that courts have legitimized unconstitutional seizures by permitting the routine introduction of the fruits of such seizures.

Moreover, by changing the focus from probable cause to simply obtaining a warrant, the proposal would encourage police violation of the Fourth Amendment. A system of magistrate-shopping would replace an internal police review process designed to review warrant applications for probable cause. In the end, for the police officer seeking a warrant, the question will no longer be what he knows, but who he knows.

b. The adoption of a good-faith proposal would "stop dead in its tracks judicial development of Fourth Amendment rights." *United States v. Peltier*, 422 U.S. 531, 554 (Brennan, J., dissenting). This is because trial courts will not reach the Fourth Amendment issues if they deem the evidence admissible under a good-faith exception. Indeed, the case and controversy requirement of Article III, section 2 of the Constitution forbids unnecessary consideration of constitutional questions. Also, practically, federal trial courts already overburdened with excessive caseloads will not engage in intellectual exercises into the complexities of search-and-seizure law. Without resolution of search-and-seizure issues below, appellate courts will not add to the development of Fourth Amendment law.

c. The inevitable result of freezing Fourth Amendment development will be the obfuscation of bright-line rules to guide police conduct. This would deprive police officers of needed guidance as to what actions are constitutionally impermissible. Moreover, in the absence of clear rules of conduct, almost all police actions will eventually be upheld as taken in the "reasonable good-faith" belief in their legality. Ultimately, instead of encouraging compliance with the Fourth Amendment, the good-faith proposal would result in widespread police avoidance of its mandate.

d. In warrant cases, the good-faith proposal would create a "super-magistrate" insulated from judicial review and

not deterred from authorizing searches on less than probable cause. Petitioner has argued that deterrence of magistrates is unnecessary, and that evidence seized pursuant to a defective warrant should, nevertheless, be admissible, for exclusion of the evidence would not deter police misconduct. Since, except in egregious cases, the existence of a warrant would sustain a good-faith finding, and the suppression judge will not reach the Fourth Amendment issues, the decision of the magistrate would routinely escape the rigours of judicial scrutiny.

The super-magistrate syndrome implicit in a good-faith scheme would be intolerable. Deterrence of magistrates issuing search warrants on less than probable cause is as essential to the promotion of Fourth Amendment compliance as is police deterrence. Moreover, the Fourth Amendment imperative of preventing searches and seizures without probable cause as a bulwark against unlawful invasions of privacy would soon dissipate without judicial review. If our system is to operate effectively, courts must have authority to inform magistrates that issuance of defective warrants will not be tolerated.

3. In addition to its constitutional infirmities, the good-faith proposal is simply bad policy. It is unnecessary, untimely and impractical and should be firmly rejected.

a. The good-faith proposal is unnecessary and redundant, as the probable cause standard accounts for a police officer's "reasonable mistake." Probable cause is not negated if the facts presented by the officer to the magistrate are inaccurate (as long as the officer reasonably believed them to be true) or if the assessment that the search would produce evidence of crime was in error. However, the proposal seeks to take the analysis one step further, and justify a search lacking in probable cause on the basis that the police acted with a "reasonable unreasonable belief" — an argument obvious in its incongruity.

b. Petitioner's good-faith proposal as it applies to warrant cases is particularly troubling in light of the Court's

recent decision in *Illinois v. Gates*, 103 S.Ct. 2317 (1983). With that decision, the Court has markedly facilitated the ability of police officers to obtain search warrants and significantly diminished the possibility, already rare, that the issuing magistrate's decision will be overturned on review. Indeed, to show a "substantial basis" that a "fair probability" existed that a search would be fruitful is not a difficult test to meet. To now impose a good-faith standard in view of the effects of *Gates* on the probable cause requirement would be to create a "double dilution" of the Fourth Amendment.

c. In recent decisions, this Court has limited the applicability of the exclusionary rule by restricting the scope of the Fourth Amendment and by narrowing the circumstances in which the rule may be employed. For example, the Court has adopted a restricted view of the right to privacy in cases pertaining to electronic surveillance, pen registers and bank records. It has similarly held that the Fourth Amendment warrant requirement does not pertain to certain police searches based on less than probable cause made of stopped automobiles and containers found therein. Where no violation of the Fourth Amendment is found, the exclusionary rule is, of course, inapplicable.

In other decisions, the Court has specifically narrowed the circumstances where the exclusionary rule may be applied in the face of Fourth Amendment violations. The rule is not applicable in certain proceedings collateral to the criminal trial (grand jury proceedings, civil proceedings to collect federal wagering taxes, and habeas corpus proceedings brought by state prisoners where Fourth Amendment issues were litigated below) and for certain purposes at the criminal trial (impeachment of defendant). Moreover, the rule may be invoked to exclude evidence at trial only by those defendants having an expectation of privacy in the premises illegally searched.

These decisions demonstrate the current inappropriateness of a good-faith proposal. First, the cumulative effect

of limiting the applicability of the exclusionary rule is to diminish its ability to deter police misconduct. This is primarily because police have an increasing number of possibilities for use of illegally-seized evidence so they are more willing to chance violation of the Fourth Amendment. Furthermore, the Court's approach to modification of the exclusionary rule provides needed flexibility and moderation, and is more prudent than an obliteration of the rule resulting from a good-faith proposal.

d. The practical application of a good-faith test would promote police ignorance and impose an administrative burden on suppression judges. Because the reasonableness of the officer's actions would be determinative, the more ignorant the officer is of the applicable law, the more likely would his unconstitutional acts be deemed reasonable. Apparently recognizing this problem, petitioner has proposed adoption of an "objective reasonableness" standard wherein the subjective intent of the officer would not be of issue. Despite its contrary intentions, an objective reasonableness standard would not only fail to cure the problem, it would create an intolerable burden on suppression judges.

Despite the objective inquiry, the subjective component would inevitably surface. The particular officer would be asked to explain his unconstitutional conduct and the subjective minds of police brass and officers responsible for training would be probed to determine the reasonableness of the officer's actions. Moreover, the defendant seeking to prove bad faith would likely call other witnesses, such as law professors and criminal law practitioners, to demonstrate what would be expected of a reasonably well-trained police officer,

The objective reasonableness test would place an intolerable burden on suppression judges. The time-consuming and difficult determination as to what would be expected of a reasonably well-trained officer would not be the only added component of the suppression hearing. Because, under the standard, the exclusionary rule would be applicable

where the magistrate reviewing a warrant application egregiously erred, the judge would have to determine the degree of the error — egregious or moderate — and what would be expected of a reasonably competent magistrate. This determination would be cumbersome, additionally time-consuming and would serve to actually modify the probable cause standard.

e. Finally, if modification of the exclusionary rule is the objective, it is a task more appropriately delegated to Congress, where full debate on the issue has already begun. If new legislation is adopted, the Court will simply rule on the constitutionality of the statute, as opposed to present circumstances where the Court is being urged to essentially write the statute itself.

4. A cost-benefit analysis of the exclusionary rule as it is applied to suppress evidence pertaining to proof of guilt at trial shows more benefit than cost.

a. Although, as the Court has recognized, empirical proof of the exclusionary rule's deterrence is not available, experience with the rule has demonstrated its ability to deter unconstitutional conduct. The deterrence accomplished by the exclusionary rule is "systemic deterrence" — deterrence of police, of magistrates and of prosecutors from pursuing action violative of the Fourth Amendment. The rule has caused police to obtain search warrants, to increase training of field officers and to engage in working relationships with prosecutors — all in an effort to avoid suppression of evidence by ensuring compliance with the Fourth Amendment. Furthermore, in warrant cases, the magistrate scrutinizes the warrant application, knowing that his decision concerning probable cause will be reviewed at a suppression hearing; and the magistrate is guided by appellate decisions also made possible by the exclusionary rule. Indeed, the Court's expressed justifications for the exclusionary rule have recognized the need for systemic deterrence of Fourth Amendment violations to preserve judicial integrity and maintain popular trust in government.

The exclusionary rule is the only effective means to ensure Fourth Amendment compliance. The experience in states without the exclusionary rule between *Wolf* (338 U.S. 25 (1949)) and *Mapp* (367 U.S. 643 (1961)) demonstrated the futility of relegating Fourth Amendment protection to remedies other than the exclusionary rule. With the Court's decision in *Mapp*, police departments modified drastically their procedures and policies and retrained their officers as if the Court had just created the Fourth Amendment. Moreover, the remedies currently available to redress Fourth Amendment violations — *e.g.* criminal prosecution, federal injunction or damage action against the perpetrating officer or his agency — lack the capacity to cause a police officer seeking to apprehend a criminal to comply with the dictates of the Fourth Amendment.

b. The costs of the exclusionary rule pale in the face of its substantial benefits.

First, petitioner contends that the rule deprives the courts of relevant and trustworthy evidence and therefore results in the freeing of guilty persons. Fundamentally this argument is misdirected. It is not the exclusionary rule, but the Fourth Amendment, which prohibits police from making unreasonable searches and seizures — a balancing made by the founders between the concern for privacy and the need for law enforcement at the expense of truth-finding. Moreover, in practice, empirical studies indicate that few prosecutions are declined for Fourth Amendment reasons and in cases where suppression motions are filed, they are seldom granted. Therefore, the exclusionary rule actually has only minimal impact on the freeing of seemingly guilty persons.

Moreover, petitioner claims that the exclusionary rule serves to lessen public respect for the judicial system. Again, if the public holds the rule accountable for the woes of the system, it is misinformed, for it is not the rule, but the Fourth Amendment, which makes the police officers' acts illegal. In any event, the unpopularity of judicial decisions

has never been a sound reason to compromise the independence of the judiciary and change such decisions. Actually, the exclusionary rule promotes public security and confidence in government, for it stands as an official model of the government's refusal to tolerate police illegality.

Other so-called costs of the exclusionary rule claimed by petitioner merit brief comment. The exclusionary rule does not burden the judicial system by encouraging the filing of suppression motions. Without such filings, Fourth Amendment rights would not be enforced and articulated in court decisions. In fact, the judicial system would be intolerably burdened by the expanded complexity and duration of suppression hearings resulting from a good-faith proposal. Furthermore, petitioner's claim that the exclusionary rule fails to remedy innocent victims does not suggest that the rule is not a necessary remedy, only that it is not a sufficient one. The rule does decrease the amount of potential innocent victims by giving police incentive to restrict intrusive activity. Also, petitioner's claim that the rule chills police investigation should again be directed at the Fourth Amendment. The very gravity of the sanction of exclusion provides greater incentive for police to comply with the Fourth Amendment. Finally, petitioner claims the rule threatens the Fourth Amendment because judges are reluctant to free the guilty. The Fourth Amendment is not threatened by the exclusionary rule, it is enforced by it. Rather, the Amendment is threatened by police who invade privacy and by courts, hopefully few, which ignore the dictates of the Amendment and render decisions contrary to law.

ARGUMENT

I. WHERE THE GOVERNMENT SEEKS TO PROVE GUILT AT A FEDERAL CRIMINAL TRIAL WITH ILLEGALLY-SEIZED EVIDENCE, THE EXCLUSIONARY RULE IS CONSTITUTIONALLY-COMPELLED, AND THE COURT HAS REJECTED, DIRECTLY AND IMPLICITLY, A GOOD-FAITH MODIFICATION OF THE RULE

For nearly seventy years, the government has been barred from proving a defendant's guilt at a federal criminal trial

with evidence seized by federal law enforcement officers in violation of the Fourth Amendment. The government now urges the Court to permit use of such evidence if the unconstitutional seizure was due to a good-faith, reasonable mistake of the officer. The theoretical justification for petitioner's good-faith proposal is that the exclusionary rule is judicially-created, not constitutionally-compelled, and therefore this Court can so modify the rule if warranted by a cost-benefit analysis.

We submit that where the government seeks to prove guilt at a federal criminal trial with illegally-seized evidence, the exclusionary rule is constitutionally-compelled. The rule is both rooted in the Fourth Amendment and Fifth Amendment privilege against self-incrimination and is a constitutional remedy essential to enforcement of the Fourth Amendment. Moreover, some decisions of this Court have directly rejected a good-faith proposal. And the reasoning and holdings in other decisions of the Court are wholly inconsistent with adoption of such a proposal.

A. The Origin And Development Of The Exclusionary Rule Demonstrate Its Constitutional Imperative

The exclusionary rule is constitutionally-compelled where the government seeks to prove guilt at trial with illegally-seized evidence. The origin and development of the rule demonstrate its constitutional nature in two respects. First, the rule is rooted in the Fourth Amendment right against unreasonable search and seizure and the Fifth Amendment privilege against self-incrimination when viewed in conjunction with the Fourth Amendment. *See, Kamisar, Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?* 16 Creighton L. Rev. 565, 621-27 (1982-1983); Schrock and Welsh, *Up From Calandra; The Exclusionary Rule as a Constitutional Requirement*, 59 Minn. L. Rev. 251, 271-307 (1974). Second, the rule is a constitutional remedy essential to enforcement of the Fourth Amendment. Stewart,

The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1383-89 (1983).¹

1. This Court in *Mapp v. Ohio*, 367 U.S. 643, 656-57 (1961) recognized that the exclusionary rule is an "essential part" of the Fourth Amendment. This position finds support as early as the Court's decision in *Weeks v. United States*, 232 U.S. 383 (1914), where the Court held that in a federal prosecution, the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. It explained that exclusion was mandated to give meaning to the Fourth Amendment; for without exclusion, the "protection of the 4th Amendment, declaring [the citizen's] right to be secure against such searches and seizures, is of no value, and, . . . might as well be stricken from the Constitution." *Weeks*, 232 U.S. at 393. In the years between *Weeks* and *Mapp*, the exclusionary rule was deemed part and parcel of the Fourth Amendment and was used to bar illegally seized evidence in federal prosecutions. The observation made by the Court in *Olmstead v. United States*, 277 U.S. 438 (1928) was accurate: "The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment" (*id.* at 462).² Indeed, the Court left no doubt in *Mapp* that "the

¹This article, authored by former Associate Justice Potter Stewart, is scheduled to be published at approximately the time of the filing of this Brief.

²Other cases reached similar conclusions. E.g., *Breithaupt v. Abram*, 352 U.S. 432, 434 (1957) ("It has been clear since *Weeks* (citation omitted) that evidence obtained in violation of rights protected by the Fourth Amendment to the Federal Constitution must be excluded in federal criminal prosecutions); *Goldstein v. United States*, 316 U.S. 114, 120 (1942) (Evidence obtained in violation of the Fourth Amendment cannot be introduced "for the reason that otherwise the policy and purpose of the amendment might be thwarted."); See also *McNabb v. United States*, 318 U.S. 332, 339-340 (1943) ("[a] conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand").

Weeks rule is of constitutional origin." *Mapp*, 367 U.S. at 649. See *United States v. Calandra*, 414 U.S. 338, 355 (1974) (Brennan, J., dissenting).

The exclusionary rule has not only been linked to the Fourth Amendment, it has been given constitutional basis in the Fifth Amendment privilege against self-incrimination. Mr. Justice Black in his decision in *Mapp* pronounced: "... when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule." *Mapp*, 367 U.S. at 662 (Black J., concurring) (emphasis added).³

Justice Black's interpretation of the exclusionary rule is supported by decisions of this Court from *Boyd* to *Mapp*. In *Boyd v. United States*, 116 U.S. 616 (1886) the federal government sought the production of an invoice of allegedly illegally-imported goods for purposes of forfeiture. Objection was raised that such production constituted a search prohibited by the Fourth Amendment. The Court, per Justice Bradley, agreed and held that the fruits of the search must be excluded as evidence. The Court reasoned:

For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always

³This pronouncement of Justice Black is particularly noteworthy in light of the petitioner's contention that the exclusionary rule is a "judicially-created remedy" that may be modified to permit introduction of illegally-seized evidence to prove guilt at trial. The notion that the rule was "judicially-created" derives from a statement made by Justice Black in his concurring opinion in *Wolf v. Colorado*, 338 U.S. 25, 39-40 (1949), twelve years prior to *Mapp*. And, it is this statement upon which the Court has recently relied to reject expansion of the exclusionary rule in collateral proceedings. See, e.g. *United States v. Calandra*, 414 U.S. 338, 348 (1974). But as will be argued herein, and as is emphasized by Justice Black's reasoning in *Mapp*, petitioner erroneously relies on the restricted applicability of the exclusionary rule in collateral proceedings to justify the introduction of illegally-seized evidence at trial. The error of the contention is underscored by the fact that exclusion of such evidence at trial, where self-incrimination is greatest, is mandated by the Fifth Amendment.

made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; . . . And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself.

Boyd, 116 U.S. at 633.

Moreover, in two cases immediately following *Weeks*, the Court solidified the Fifth Amendment basis of the exclusionary rule. In *Gouled v. United States*, 255 U.S. 298 (1921) the government had seized papers during an illegal search. In suppressing the evidence, the Court characterized exclusion of illegally-seized evidence as a "constitutional right", (*id.* at 313) and held that admission of papers seized in violation of the Fourth Amendment violated the Fifth Amendment (*id.* at 312-313). Similarly, in *Agnello v. United States*, 269 U.S. 20 (1925), the Court extended the exclusionary rule's application from papers to cocaine. In holding that a defendant was not required to move before trial for suppression of cocaine seized in violation of the Fourth Amendment, the Court explained that in making such motion the defendant would have improperly forfeited his Fifth Amendment privilege against self-incrimination. (*id.* at 34). In the years following *Gouled* and *Agnello*, the Court continued to justify the exclusionary rule in terms of the Fifth Amendment.⁴

⁴See, e.g. *McGuire v. United States*, 273 U.S. 95, 99 (1927) ("The Fourth and Fifth Amendments protect every person from the invasion of his house by federal officials without a lawful warrant and from incrimination by evidence procured as a result of the invasion"). In *Davis v. United States*, 328 U.S. 582, 587 (1946), the Court explained: The law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the [Fourth and Fifth Amendments] . . . It reflects a dual purpose — protection of the privacy of the individual, his right to be let alone; protection of individual against compulsory production of evidence to be used against him. (citations omitted).

2. The exclusionary rule is not only rooted in the Fourth and Fifth Amendments, it is a constitutionally-compelled remedy where the government seeks to prove guilt at trial with evidence seized in violation of the Fourth Amendment. Justice Clark, writing for the majority, pronounced in *Mapp* that the exclusionary rule is

a clear, specific and constitutionally required — even if judicially implied — deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a ‘form of words’.

Mapp, 367 U.S. at 648, quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.). Although the strict wording of the Fourth Amendment is couched in terms of rights, not remedies,⁵ the framers of the constitution no doubt intended the rights to be more than a code of ethics without legal enforcement. Indeed, in the years between *Boyd* and *Mapp*, this Court fashioned the exclusionary rule to enforce the Fourth Amendment’s prohibition against unreasonable searches and seizures “by removing the incentive to disregard it.” *Elkins v. United States*, 364 U.S. 206, 217 (1960).

The need for an appropriate enforcement of the Fourth Amendment is demonstrated by its history. The Fourth Amendment was proposed by the First Congress and enacted by the states to ensure that the individual would be secure from unreasonable government intrusion. Indeed, when the Constitutional Convention met in 1787 considerable opposition to ratification was voiced in light of the omission of a bill of rights and specifically a provision addressing searches. See N. Lasson, *The History and Development of*

⁵The Fourth Amendment commands that the right of the people to be secure against unreasonable searches and seizures “shall not be violated” but is silent about how to remedy violation of the right. The fact that the Fourth Amendment does not specifically provide for an exclusionary rule is probably attributed to the framers’ belief “that by thus controlling search warrants they had controlled searches”. *Harris v. New York*, 331 U.S. 145, 196 (1947) (Jackson J., dissenting). See Kamisar, *supra*, 16 Creighton L. Rev. at 578.

the Fourth Amendment to the United States Constitution, at 92-96 (reprinted 1970). The colonists sought to ensure that the government's arbitrary power of search exercised in the form of general warrants in England and writs of assistance in the colonies be restricted by the new Constitution.⁶

The "central objectionable feature" of both the general warrants and writs of assistance was that "they provided no judicial check" on the discretion of governmental officials. *Steagald v. United States*, 451 U.S. 204, 220 (1981). See Kamisar, *supra*, 16 Creighton L. Rev. at 565. A basic purpose of the Bill of Rights, particularly the Fourth Amendment is "subordinat[ing] police action to legal restraints." *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting). As Professor Amsterdam has noted, "the fourth amendment is quintessentially a regulation of the police" — "in enforcing the fourth amendment, courts must police the police." Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 371 (1974). And in Justice Stewart's view, the exclusionary rule is a constitutionally-required remedy, "necessary to keep the right of privacy secured by the fourth amendment from 'remain[ing] an empty promise' " [*Mapp*, 367 U.S. at 660] because it is the *only* remedy that "inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the fourth amendment." Stewart, *supra*, 83 Colum. L. Rev. at 1389.

B. A "Good Faith" Proposal To Modify Application Of The Exclusionary Rule In The Criminal Trial Setting Has Been Directly And Implicitly Rejected By This Court

1. As early as 1959, this Court expressly rejected the argument that the good faith of the arresting officer can substitute for probable cause. See *Henry v. United States*,

⁶In reference to the writs of assistance James Otis pronounced that they were "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that was ever found in an English law book." John Adams was later to comment of the 1761 debates which produced Otis' proclamation "then and there was the . . . first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Boyd v. United States*, 116 U.S. 616, 625 (1886).

361 U.S. 98, 102 (1959) ("good faith on the part of arresting officers is not enough"). Indeed, the Court warned that if "subjective good faith alone were the test, the protections of the fourth amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects', only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964). See also *Taylor v. Alabama*, 102 S.Ct. 2664, 2669 (1982) ("To date, we have not recognized such [a "good-faith"] exception. . ."). Moreover, significant decisions of this Court refining Fourth Amendment protections would be rendered meritless under petitioner's proposed reasonable good-faith exception.

Ybarra v. Illinois, 444 U.S. 85 (1979) is a case in point. In *Ybarra*, the police arrived at a tavern to execute a search warrant. They conducted searches of patrons under the authority of an Illinois statute. Although the police had acted reasonably, the Court held the search unconstitutional and suppressed the evidence. Under a good-faith exception, *Ybarra* would have a contrary result. See also *Torres v. Puerto Rico*, 442 U.S. 465 (1979). Furthermore, in *Whiteley v. Warden*, 401 U.S. 560 (1971), the Court suppressed evidence despite the undisputed good faith of the arresting officers (*id.* at 569). There, based on a police radio bulletin advising the officers of an outstanding warrant, they arrested the defendants and seized stolen property during a vehicle search. The officers had no way of knowing that the affidavit underlying the warrant was insufficient. Although the officers made, unquestionably, a reasonable mistake, the Court suppressed the evidence, holding that the arrest and search violated the Fourth Amendment.⁷

⁷In a wide range of other decisions, this Court has expanded the contours of the Fourth Amendment in ways that would be unforeseeable to police officers, and, therefore, unjustified under the good-faith exception. Yet the importance of these decisions to the advancement of Fourth Amendment protections cannot be denied. *E.g. Chimel v. California*, 395 U.S. 752 (1969) (search incident to arrest unreasonable if extends beyond immediate reach of arrestee); *Katz v. United States*, 389 U.S. 347 (1967) (eavesdropping constitutes search in absence of physical trespass); *Delaware v. Prouse*, 440 U.S. 648 (1979) (random

Finally, the Court's recent decision in *United States v. Johnson*, 102 S.Ct. 2579 (1982) precludes the adoption of a good-faith exception to the exclusionary rule. In *Johnson*, the Court held that the rule of *Payton v. New York*, 445 U.S. 573 (1980) — that, absent exigent circumstances, the police must obtain a warrant to make a home arrest — would be applied retroactively to mandate reversal of a conviction that had previously been obtained but had not become final when *Payton* was decided. The government, relying on language from *United States v. Peltier*, 422 U.S. 531 (1975) had argued that "the only Fourth Amendment rulings worthy of retroactive application are those in which the arresting officers violated pre-existing guidelines clearly established by prior cases." For only such rulings, the government contended, established "settled" law of which a police officer could "properly be charged with knowledge." *Johnson* at 2592-93.

The position of the United States in *Johnson* is remarkably similar to that proposed here. In *Johnson*, the government argued in substance that the officer's "reasonable mistake" in violating Fourth Amendment principles should permit admission of the evidence. However, the Court in *Johnson* rejected the argument on the ground that it would reduce the retroactivity doctrine "to an absurdity" since, "the Government's theory would automatically eliminate *all* Fourth Amendment rulings from consideration for retroactive application" (*id.* at 2593).

The same "absurdity" is pertinent to the government's reasonable good-faith proposal. Particularly in warrant cases,

traffic stops are Fourth Amendment intrusions); *Payton v. New York*, 445 U.S. 573 (1980) (warrant required, absent exigent circumstances, to make arrest in home). "Although to one degree or another these decisions may have been prefigured by earlier opinions, they were sufficiently unforeseeable that the officers who searched Chimel's home, entered to arrest Payton . . . , eavesdropped on Katz, or stopped Prouse, all would pass a test of reasonable, good faith conduct." Mertens and Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating The Police and Derailing The Law*, 70 Geo. L.J. 365, 441 (1981).

the proposal would effectively eliminate application of the exclusionary rule to criminal trials (*see* pages 26-28, *infra*). The so-called exception to the rule would become the rule. Moreover, as the development of Fourth Amendment law is progressively impeded by the elimination of the exclusionary rule, the police officer's actions would become more and more "reasonable" in the absence of any "settled" law directing his actions (*see* pages 45-46, *infra*).

In addition, the *Johnson* Court also rejected the government's argument that application of *Payton* would not deter police illegality. The Court noted, with direct applicability to the proposed reasonable good-faith exception:

If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be non-retroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counter-balanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord any retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach."

id. at 2593-94, *quoting Desist v. United States*, 394 U.S. at 277 (Fortas, J., dissenting) (footnote omitted).

Indeed, with the adoption of a reasonable good-faith exception, police officers would be encouraged to err on the side of conducting potentially unconstitutional searches and seizures, recognizing that their actions, although possibly violative of the Fourth Amendment, may, nevertheless, be deemed reasonable. Police will be encouraged to "disregard the plain purport of [the Court's] decisions and to adopt a let's-wait-until-it's-decided approach." This situation, found

intolerable by the Court in the retroactivity context, should be equally intolerable here. This is particularly so for the very survival of the Fourth Amendment is at stake.

2. At the heart of petitioner's theoretical justification for its cost-benefit approach are post-*Mapp* cases wherein the Court has refused to *extend* the exclusionary rule to circumstances *collateral* to proof of guilt at trial. The reasoning found in such cases belies the petitioner's proposal. Although the Court expressed skepticism that additional deterrence could be achieved through exclusion of evidence in such contexts, it consistently assumed that the exclusionary rule would be vigorously applied in the trial setting.

For example, in *United States v. Calandra*, 414 U.S. 338 (1974), the Court held that a witness before a federal grand jury was not privileged to refuse to answer questions on the ground that such questions were based upon illegally-seized evidence. The Court explained first that "[s]uppression of the use of illegally seized evidence against the search victim in a criminal trial is thought to be an important method of effectuating the Fourth Amendment" (*id.* at 350). But the Court reasoned that application of the exclusionary rule to the grand jury context would not likely deter unlawful police conduct because the "incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the *inadmissibility of the illegally seized evidence in a subsequent criminal prosecution of the search victim*" (*id.* at 351) (emphasis added). Accordingly, the underlying assumption in the Court's holding is that the exclusionary rule would be relied upon in the trial setting as the means by which police are deterred from unlawful activity.

Similarly, in *United States v. Janis*, 428 U.S. 433 (1976) the Court declined exclusion from federal civil proceedings evidence unlawfully seized by a state criminal enforcement officer. The Court explained that exclusion would not have a "sufficient likelihood of deterring the conduct of state police" (*id.* at 454). The Court recognized that the deter-

rence of the police would be achieved by excluding the illegally seized evidence in both the state and federal criminal trial. Again, the Court relied on the application of the exclusionary rule in the criminal trial setting as the underpinning of its decision.

The same underlying assumption is implicit in the Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976). At issue in *Stone* was whether state prisoners — who have been afforded the opportunity for full and fair review of their search and seizures claims in the state trial and appellate court — may invoke their claim again on federal habeas corpus review. Although initially enumerating the "costs" implicit in an exclusionary rule (*id.* at 489-490), and recognizing the absence of empirical data demonstrating the deterrent effect of the rule, the Court relied on the availability of the rule in the trial setting to justify its refusal to extend it to the federal habeas arena. The Court reasoned that no additional deterrence of police misconduct could be achieved by the proposed extension of the rule since the "risk of exclusion of evidence at trial or the reversal of convictions on direct review . . ." already created the necessary disincentive (*id.* at 493). Again, preservation of the exclusionary rule in its present form in the trial setting was the underlying assumption of the Court's decision.

In each of these cases — *Calandra*, *Janis* and *Stone*, the Court's reasoning would have found no accommodation for petitioner's proposed reasonable good-faith exception. The Court's decisions would not have countenanced the introduction of illegally-seized evidence to prove guilt at trial.

II. THE GOOD-FAITH PROPOSAL IS CONSTITUTIONALLY UNSOUND AS IT THREATENS THE SURVIVAL OF THE FOURTH AMENDMENT

At first glance, petitioner's good-faith exception to the exclusionary rule appears to seek a mere modification of the rule. But, under closer scrutiny, the widespread effects of the proposed exception are revealed. We submit that the

proposal will retire the exclusionary rule into extinction, and in the process threaten the very survival of the Fourth Amendment itself. In this sense, the good-faith proposal is dangerously unconstitutional and must be rejected.⁸

The good-faith proposal threatens the Fourth Amendment in four key respects. First, it would serve to erode the probable cause standard in warrant cases by condoning the regular use of evidence seized without probable cause at trial. Second, the proposal would "stop dead in its tracks judicial development of Fourth Amendment rights." *United States v. Peltier*, 422 U.S. 531, 554 (Brennan, J., dissenting). Moreover, the resulting obfuscation of bright-line rules to guide police conduct would mean the "right of the people would be secure . . . only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964). Finally, the proposal would encourage the judicial officer reviewing warrant applications to authorize searches violative of the Fourth Amendment. The warrant process under a good-faith proposal would essentially create a "super-magistrate" not deterred from unconstitutional decisions and not subject to the scrutiny of judicial review.

*The good-faith proposal has been criticized by noted authorities. E.g., Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1399-1403 (1983); Kamisar, *Prepared Remarks (Pt. I) of Yale Kamisar at the Fifth Annual Supreme Court Review and Constitutional Law Symposium*, 33-46 (Sept. 23, 1983) (hereinafter "Constitutional Law Symposium") (a copy of these remarks has been lodged with the Court and reference to them was made in 52 U.S. Law Week at 2230-2231 (Oct. 25, 1983) and see also the remarks of Professor Kamisar and Judge Shirley Hufstедler at the American Bar Association, Criminal Justice Section debate, 33 Cr. L. Rptr. 2404, 2408-12 (Aug. 17, 1983); LaFave, *The Fourth Amendment In An Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307, 352-59 (1982); Schlag, *Assaults On the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. Crim. L. and Criminology 875, 895-907 (1982); Mertens and Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 Geo. L.J. 365 (1981).

A. Erosion Of Probable Cause

1. *The Courts.* Fundamental to the good-faith proposal is its countenance of the routine admission of unconstitutionally-seized evidence at trial. Here, petitioner urges that evidence seized without probable cause below be, nevertheless, admitted on the ground that the police officer acted in good-faith reliance on a warrant. Under the proposal, except in egregious cases, the only qualification for admission of evidence at trial would be the existence of a warrant; no longer would the very aspect of Fourth Amendment protections deemed most crucial for preservation of a free society, namely that "no warrant shall issue, but upon probable cause" be of concern.⁹

Courts routinely permitting the introduction of evidence seized in violation of the Fourth Amendment would announce to our citizenry that the words and meaning of the Amendment are no longer sacred. For if unconstitutionally-seized evidence is not excluded "it is difficult for the citizenry to believe that the government truly meant to forbid the conduct in the first place." Paulsen, *The Exclusionary Rule and Misconduct By The Police*, 52 J. Crim. L., Crim. & P.S. 255, 258 (1961). It is no answer to argue that it is not the courts but the police officer who has acted unconstitutionally. Deference should be paid to the charge of the Court in *Weeks v. United States*, 232 U.S. 383 (1914) that

⁹The erosion of the probable cause standard was candidly recognized by a supporter of a good-faith exception upon whom petitioner relies (Pet. Br. 47, 78). Professor Edna Ball arguing for a weakened Fourth Amendment to unhandcuff police in their law enforcement efforts stated:

The good faith doctrine should not be judged by its effect on the exclusionary rule but by its effect upon the standards which define when citizens will be protected against government intrusion. To the extent that probable cause is the key to fourth amendment protections, the good faith exception diminishes the liberality of the fourth amendment. . . . In other words what it requires is no longer 'probable cause' as presently defined, but instead a 'reasonable ground for belief'.

Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 655-656 (1978).

the "tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of courts which are charged at all times with the support of the Constitution. . ." (*id.* at 392). It is a distinction without substance to attempt to insulate courts from the unlawful activity of the police, since admission of the unconstitutionally-seized evidence makes the court a participant in the illegality.¹⁰ Both the police who seized the evidence and the court which allowed its use are part of the "government's" approval of systemic lawlessness. The dangers of such a system are well-recognized.¹¹

2. *The Police.* This Court has held that evidence must be excluded at the criminal trial if it encourages violations of the Fourth Amendment. See *United States v. Janis*, 428 U.S. 433, 458-59, n. 35 (1976). The use of unconstitutionally-seized evidence at trial under the good-faith proposal would encourage police to side-step Fourth Amendment restrictions. To the police who are "engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), admissibility will be equated with legality, 1 W. LaFave, *Search & Seizure*, §1.2, p. 12 (Supp. 1983). As the Court stated in *Terry v. Ohio*, 392 U.S. 1, 13 (1968), "[a] ruling admitting ev-

¹⁰Chief Justice Traynor observed:

When . . . the very purpose of an illegal search and seizure is to get evidence to introduce at trial, the success of the lawless venture depends entirely on the court's lending its hand and by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the government acting as judge.

People v. Cahan, 44 Cal.2d 434, 445, 282 P.2d 905, 912 (1955).

¹¹Mr. Justice Brandeis warned in *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting):

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously . . . For good or for ill [our government] teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law, it invites every man to become a law unto himself; it invites anarchy.

idence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."

Under the proposal, police will no longer be primarily concerned with whether they have probable cause to search. Because evidence seized pursuant to a warrant will be admitted without probable cause, the police will change their focus accordingly. The proposal would reverse the present incentive for police "in close cases . . . to err on the side of constitutional behavior . . . and, rather, encourage police . . . to adopt a lets-wait-until-its-decided-approach." *United States v. Johnson*, 102 S.Ct. 2579, 2593-94 (1982). Moreover, since admission of evidence will turn, not on the existence of probable cause, but on whether the police found a magistrate willing to sign a warrant, a system of magistrate-shopping¹² will replace an internal police review process designed to review warrant applications for probable cause.¹³ And, because, as will be shown, the magistrate's decision will not be subjected to the rigours of judicial review (see pages 29-32, *infra*) magistrates will become more inclined to comply with police requests for warrants.¹⁴

¹²Under our existing system, some police already shop for the most sympathetic magistrates for presentation of their warrant applications. See L. Tiffany, D. McIntyre & D. Rotenberg, *Detection of Crime* 120 (1967). Under a good-faith proposal, magistrate shopping would increase substantially.

¹³An internal police review procedure is one of the aspects of systemic deterrence of conduct violative of the Fourth Amendment made possible by the exclusionary rule (see, pages 51-56, *infra*).

¹⁴Professor Wayne LaFave warns that adoption of the good-faith proposal would result in a pro-law enforcement bias in suppression rulings. LaFave, *The Fourth Amendment In An Imperfect World: On Drawing "Bright Lines" and "Good Faith"* 43 U.Pitt. L. Rev. 307, 357-58 (1982). Moreover, a leading opponent of the exclusionary rule expressed "no doubt" that under our present system "judges do misconstrue the Fourth Amendment and fudge the standards of probable cause, all in what they consider to be the overall good of justice and the community." Wilkey, *A Call For Alternatives to the Exclusionary Rule*, 62 *Judicature* 351, 356 (1979). The adoption of a "reasonableness" standard under a good-faith proposal, giving wide latitude to courts already inclined to admit evidence, will add insult to injury. The

(footnote continued on following page)

In the end, for the police officer seeking a warrant, the question will no longer be what he knows, but who he knows.

B. Freezing Judicial Development Of Fourth Amendment Law

The development of Fourth Amendment law is a dynamic process. The contours of constitutionally-permissible police conduct are defined by court decisions interpreting the Amendment. At the center of this process is the exclusionary rule which provides defendants an incentive to raise the Fourth Amendment issues as a means of suppressing illegally-seized evidence. Professor Dallin Oaks, a critic of the exclusionary rule (Pet. Br. 41) recognized: "It is . . . imperative to have a . . . procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule — entirely apart from any direct deterrent effect — is that it provides an occasion for judicial review . . ." Oaks, *Studying The Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 756 (1970).

The adoption of a good-faith exception to the exclusionary rule would, as Justice Brennan forecasted, "stop dead in its tracks judicial development of Fourth Amendment rights." *United States v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting). This is because courts will not reach the Fourth Amendment issues if they deem the evidence admissible under a good-faith exception. And defendants, interested in prevailing in their own cases and not advancing abstract points of law to benefit others, will not pursue Fourth Amendment challenges.

The courts' anticipated avoidance of the Fourth Amendment issues is supported by precedent and practicality. In

practice of judges merely "rubber stamping" police warrant applications will become commonplace, contrary to the admonitions of this Court that "the magistrate [must] perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Aguilar v. Texas*, 378 U.S. 108, 111 (1964).

deed, "there is clear precedent for avoiding decision of a constitutional issue raised by police behavior when in any event the evidence [is] admissible in the particular case at bar." *Peltier*, 422 U.S. at 555, n. 14 (Brennan, J., dissenting). The case and controversy requirement of Article III, section 2 of the Federal Constitution would prohibit a court from deciding the constitutional question if it had deemed the evidence admissible under a good-faith exception. See *Bowen v. United States*, 422 U.S. 916, 920 (1975) (Supreme Court cautioned federal district and appellate courts against deciding Fourth Amendment issues when the retroactivity question resolved the case, noting its "reluctance to decide constitutional questions unnecessarily."); see also *Defunis v. Odegaard*, 416 U.S. 312, 316 (1974) ("federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them."); *Stovall v. Denno*, 388 U.S. 298, 301 (1967) (Article III precludes announcing rule of law purely prospectively without application to case in which rule is announced.)

Moreover, from a practical viewpoint, federal trial courts are not likely to resolve Fourth Amendment issues when the evidence is, nevertheless, admissible. As petitioner has acknowledged, trial courts are already burdened by increasing caseloads. To expect them to engage in intellectual exercises into the complexities of Fourth Amendment law is to ignore present day realities. Moreover, where the trial court has not reached the Fourth Amendment issues, the appellate court will not add to the development of Fourth Amendment law.¹⁵

¹⁵The accuracy of this projection is highlighted by two cases which have adopted a good-faith analysis. In *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) cert. denied 449 U.S. 1127 (1981), thirteen judges considered it unnecessary to determine if the arrest was illegal, since "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions taken in good faith. . . ." (*id.* at 840). Also, in *Richmond v. Commonwealth*, No. 80-CA-1366-MR (Ky. Ct. App., July 31, 1981), *aff'd on other grounds*, 637 S.W.2d 642 (Ky. 1982), the court refused to decide the constitutional issue — whether the judge had authority to issue a warrant outside his territorial jurisdiction — because, it concluded, suppression of the evidence was precluded under a good-faith rationale.

Petitioner leaves open the possibility (perhaps the hope), that courts will resolve significant Fourth Amendment issues even when the good-faith exception determines the outcome (Pet. Br. 83-84). But, as Professor LaFave points out, supporters of the good-faith exception would be expected to press for elimination of Fourth Amendment resolution once the exception was adopted. LaFave, *supra*, 43 U. Pitt. L. Rev. at 355. In sum, under a good-faith scheme, the history of this Court's refinement of Fourth Amendment law would be left virtually frozen in time, abandoned to atrophy in its obsolence.

C. Obfuscation Of Bright-Line Rules Guiding Police Conduct

The inevitable result of freezing Fourth Amendment development is the obfuscation of bright-line rules to guide police conduct. This will have a dual effect. First, it will deprive police officers of needed guidance as to what actions are constitutionally impermissible. This is contrary to the Court's development of a process of bright-line categorization to permit greater police compliance with the Fourth Amendment. See *e.g. United States v. Ross*, 456 U.S. 798 (1982). Second, in the absence of clear rules of conduct, almost all police actions will be found "reasonable," and the citizenry will be protected by the Fourth Amendment "only in the discretion of the police." See Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 394 (1974).

This is an ultimate paradox of the good-faith proposal. "[I]nstead of encouraging the development of unequivocal standards to guide the police and to operate as ready benchmarks for the bad faith determination, the good faith analysis will cause courts to gravitate away from rule-oriented adjudication." Ashdown, *Good Faith And The Exclusionary Remedy*, 24 Will & Mary L. Rev. 335, 361-62 (1983). As police become increasingly ignorant of Fourth Amendment requirements, they will increasingly act in "good-faith."

Ultimately, instead of encouraging compliance with the Fourth Amendment, the good-faith proposal will promote its violation and eventual obliteration.

D. Creation Of A Super-Magistrate Insulated From Judicial Review

Petitioner's good-faith proposal is premised on its assumption that the "paramount and perhaps sole purpose" (Pet. Br. 18) of the exclusionary rule is the deterrence of unlawful police conduct. Petitioner contends that deterrence of magistrates issuing warrants is unnecessary (Pet. Br. 59), and that evidence seized pursuant to a warrant based on less than probable cause should be admissible since the police necessarily acted in good faith. We submit that judicial deterrence is essential to the furtherance of Fourth Amendment compliance. A magistrate issuing search warrants on less than probable cause, either through design or ignorance of the law, must not be tolerated. However, the good-faith proposal promotes magistrate error by foreclosing judicial review of the warrant decision. The proposal, in effect, creates a "super-magistrate" insulated from judicial scrutiny.

Judicial deterrence is as essential to the promotion of Fourth Amendment compliance as is police deterrence. This Court emphasized as early as *Weeks*, 232 U.S. at 394, that:

the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers acting under legislative or *judicial* sanction. (emphasis added)

Thus,

any rule intended to prevent Fourth Amendment violation must operate not only upon individual law enforcement officers but also upon those who set policy for them and approve their actions. Otherwise, for example, evidence derived from any search under a warrant could be admissible, because the searching policemen having had a warrant approved by the

designated judicial officer, had every reason to believe the warrant valid.

United States v. Peltier, 422 U.S. at 558-59, n. 18 (Brennan, J., dissenting).

A judicial officer who issues a search warrant lacking in probable cause violates a citizen's constitutional rights as surely as the police officer executing it. That judicial officer must be deterred from committing Fourth Amendment violations in the case at hand and in future cases. Indeed, this Court has frequently focused its attention on the conduct of the judicial officer issuing the warrant rather than on the police officer preparing the application. See, e.g. *Stanford v. Texas*, 379 U.S. 476 (1965); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Nathanson v. United States*, 290 U.S. 41 (1933). Yet, under a good-faith proposal, judicial deterrence is not feasible in the absence of judicial review of the magistrate's warrant decision.

Indeed, a particularly troubling aspect of the good-faith proposal is its creation of a "super-magistrate" whose warrant decisions would not be subjected to judicial review. Although a magistrate's probable cause determination is to be afforded deference, it would be untenable to create a system which isolates it from further judicial scrutiny. Mr. Justice Rehnquist, writing for the majority in *Illinois v. Gates*, 103 S.Ct. 2317, 2332 (1983), recently articulated:

Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusion of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued. (emphasis added)

The Fourth Amendment imperative of preventing searches and seizures without probable cause as a bulwark against unlawful invasions of privacy would soon dissipate without judicial review. See, *Franks v. Delaware*, 438 U.S. 154, 169 (1978) ("it is the *ex parte* nature of the initial hearing

. . . that is the reason for review.'')¹⁶ Indeed, a principal reason for affording judicial officers immunity has been the availability of appellate review of their decisions. *See, Bradley v. Fisher*, 13 Wall (80 U.S.) 334, 354 (1872); *Stump v. Sparkman*, 435 U.S. 349, 369 (1978) (Powell, J., dissenting). In light of our system's need to subject judicial decisions exceeding constitutional limits to review, *Rose v. Mitchell*, 443 U.S. 545 (1979), the super-magistrate syndrome associated with the good-faith proposal must be solidly rejected. Decisions pertaining to precious Fourth Amendment freedoms cannot be shrouded from the light of judicial review if the Fourth Amendment is to survive.

Justice Potter Stewart recently articulated his opposition to a good-faith exception to the exclusionary rule. With reference to the lack of judicial review of the magistrate's warrant decision, Justice Stewart cautioned that:

if the fourth amendment's probable cause requirement is to be enforced, reviewing courts must have the authority on occasion to inform magistrates in a meaningful way that warrants based on something less than probable cause are not to be tolerated.

Stewart, *supra*, 83 Colum. L. Rev. at 1403. Justice Stewart noted that proponents of the good-faith exception have argued that a reviewing court could determine whether a search warrant was supported by probable cause even if a good faith proposal were adopted. As previously argued, the prospect of a reviewing court providing moot articulations of Fourth Amendment law is both constitutionally and practically *de minimis*. Justice Stewart apparently would agree and further pointed out that even in cases where a court admits evidence obtained in good faith while declaring the

¹⁶Professor LaFave agrees that the lack of judicial review associated with a good-faith proposal would "create an additional incentive to infringe on Fourth Amendment rights." He explains that encouragement of magistrate shopping would inevitably result if both "police and magistrates knew that whatever search and seizure activity was authorized by a warrant could in no way be challenged in a criminal prosecution." LaFave, *supra*, 43 U. Pitt. L. Rev. at 353-54.

warrant lacking in probable cause,

the magistrate may receive an opinion, perhaps years after signing the warrant informing him that a mistake was made. But there is no incentive — apart from a professional desire to comply with the fourth amendment — for that magistrate to refrain from repeating the same mistake in the future or from granting any colorable request for a search warrant.

Stewart, *supra*, 83 Colum. L. Rev. at 1403.

Indeed, decisions concerning Fourth Amendment freedoms must not be left to the whims of a judicial officer insulated from judicial review. The prospect of abusive magistrate shopping is heightened by the realization that the officer need not be a lawyer or have any legal training. See *Shadwick v. City of Tampa*, 407 U.S. 345 (1972). The magistrate must be informed when his/her decisions do not comport with Fourth Amendment requirements and through a process of judicial review, all magistrates must be deterred from committing similar errors in the future. This is how the Fourth Amendment has maintained its vitality through the years. Its continued existence, however, is threatened by the creation of a super-magistrate implicit in a good-faith formulation.

III. THE GOOD FAITH PROPOSAL IS UNNECESSARY, UNTIMELY AND IMPRACTICAL AND SHOULD BE REJECTED ON POLICY GROUNDS

In addition to the constitutional infirmities of the good-faith proposal, it should be rejected on policy grounds. First, the proposal is unnecessary since the probable cause standard accounts for the “reasonable mistake” of the police officer. Moreover, in the post-*Gates* era, adoption of a good-faith proposal would create a “double dilution” of the probable cause standard in warrant cases leading to its demise. In addition, the Court has recently limited the applicability of the exclusionary rule by restricting the scope of the Fourth Amendment and narrowing the circumstances in

which the rule may be invoked; therefore, the more drastic approach of the good-faith proposal to modify the rule into extinction is inappropriate. Furthermore, the practical application of the proposal would promote police ignorance and impose an awesome administrative burden on suppression judges. Finally, it appears that modification of the exclusionary rule, if that be the objective, is more appropriately a legislative task, and Congressional debate, already ongoing, should be encouraged to continue.

A. The Good-Faith Proposal Is Unnecessary And Redundant As Probable Cause Accounts For A Police Officer's Reasonable Mistake

Petitioner proposes that when a "reasonably well-trained" police officer makes a "reasonable mistake" in his belief that a search comported with the Fourth Amendment, the fruits of that search should be admissible to prove guilt, despite the fact that the search lacked probable cause. Petitioner's proposal, if it has any merit in other contexts, has no merit where the Fourth Amendment violation at issue is that of probable cause.

"Probable cause" strikes a compromise between the citizen's right to personal liberty and the need of law enforcement to protect the community. "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." *Brinegar v. United States*, 338 U.S. 160, 175 (1948), quoting *Carroll*, 267 U.S. at 161. Probable cause is a "practical, non-technical conception," *Illinois v. Gates*, 103 S.Ct. 2317, 2328 (1983), dealing with the "factual and practical considerations of everyday life on which reasonable and prudent men, not technicians act." *Brinegar*, 338 U.S. at 175. Probable cause is indeed a fluid concept.

Ingrained in the probable cause standard is allowance for the reasonable mistakes of police officers in assessing probabilities. The Court in *Brinegar* explained:

Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on

their part. But the *mistakes must be those of reasonable men*, acting on facts leading sensibly to their conclusions of probability. (*id.* at 176) (emphasis added).

Accordingly, probable cause is not negated if the facts presented by the officers to the magistrate turn out to be inaccurate (as long as the officers reasonably believe them true) or if the assessment that the search would produce evidence of crime was in error.¹⁷ Similarly, probable cause is not defeated because a substantive criminal statute is held unconstitutional.¹⁸ Probable cause will be sustained so long as the magistrate reasonably determines that the search will produce contraband or evidence of crime, whether or not the underlying facts are, in actuality, accurate, and whether or not a crime has actually been committed. If, on judicial review of the magistrate's decision, it is determined under an objective assessment that probable cause was not present (as occurred in the instant case), it necessarily follows that the assessment of probable cause was objectively unreasonable, and, if any mistakes were made by the officers, they were likewise unreasonable.

Petitioner's proposal would have us take the analysis one step further. It seeks to create an exception to the exclusionary rule on the basis that the police had a "reasonable unreasonable belief" in the existence of probable cause. Such a proposal is logically unsound and practically inoperable.

If the police could reasonably have believed that probable cause was present below, the residence and vehicle searches would have been upheld. Because both the district court and the appellate court found probable cause lacking, they have determined that such belief was unreasonable. It makes no sense to now justify the searches on the basis that the police acted "reasonably unreasonably" or with a "reasonable unreasonable belief." This is particularly so since

¹⁷See, e.g., *Franks v. Delaware*, 438 U.S. 154, 165 (1978); *Draper v. United States*, 358 U.S. 307, 310-313 (1959).

¹⁸*Michigan v. DeFillippo*, 443 U.S. 31, 37-38 (1979).

the reviewing court must not substitute its own judgment, but rather give all due deference to the magistrate's assessment of probable cause. *United States v. Ventresca*, 380 U.S. 102, 108 (1965).

Conceivably, the reasonable good-faith proposal might carry some merit where technical violations of the warrant procedure are present.¹⁹ But, it should have no applicability where probable cause to search was lacking.²⁰

B. In The Post-Gates Era, The Good-Faith Proposal Would Impose A "Double Dilution" Of The Probable Cause Standard In Warrant Cases

Petitioner's good-faith proposal as it applies to warrant cases is particularly troubling in light of the Court's recent decision in *Illinois v. Gates*, 103 S.Ct. 2317 (1983). With

¹⁹For example, federal courts are reluctant to suppress evidence for mere technical violations of the warrant procedure unless the defendant can show prejudice. See *United States v. Wyder*, 674 F.2d 224, 225-26 (4th Cir. 1982). (Although inadvertent mistake in defendants copy of warrant indicated that search had to be conducted within five hours when original had five day time limit, evidence obtain in search not suppressed because defendant not prejudiced) *cert. denied* 102 S.Ct. 44 (1982). The Ninth Circuit adopted the standard that noncompliance with Rule 41 Fed. R. Crim. Proc. requires suppression of evidence only when "(1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional or deliberate disregard of a provision of the Rule" *United States v. Johnson*, 660 F.2d 749, 753 (9th Cir. 1981), *cert. denied* 102 S.Ct. 1263 (1982).

²⁰The Court in *Illinois v. Gates*, 103 S.Ct. 2317, 2328 (1983) reminded that probable cause requires "only the probability, and not a prima facie showing of criminal activity." It calls for a "practical, common-sense judgment." Professor Kamisar correctly questions: Can there be a "good faith reasonable absence of practical common sense judgment"? Kamisar, Constitutional Law Symposium, *supra* note 8 at 33-34. Mertens and Wasserstrom also projected:

Conceivably, a court adopting a good faith exception would decide that because reasonableness is already built into the concept of probable cause, the exception simply does not apply in this case; the court might rule that a 'reasonable' belief that probable cause was present, when it was not, is a logical impossibility because probable cause means 'reasonable grounds for belief.'

Mertens and Wasserstrom, *The Good-Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing The Law*, 70 Geo. L.J. 365, 454 (1981).

that decision the Court has markedly facilitated the ability of police officers to obtain search warrants and significantly diminished the possibility, already rare, that the issuing magistrate's decision will be overturned on review. To now admit evidence seized pursuant to a warrant that even under *Gates* is deemed lacking in probable cause is stretching the Fourth Amendment beyond acceptable limits. Or, in Professor Kamisar's words, in the post-*Gates* era, the good-faith proposal would impose a "double dilution" of the Fourth Amendment's probable cause standard.²¹

Prior to *Gates*, the establishment of probable cause in the application for a search warrant was not overly burdensome. The police officer was required to show only probability, and not a *prima facie* case of criminal activity. *Spinelli v. United States*, 393 U.S. 410, 419 (1969). Such a showing could be based on hearsay, a suspect's criminal record, or other evidence not admissible at trial. See *e.g.* *United States v. Ventresca*, 380 U.S. 102, 107-09 (1965); *Jones v. United States*, 362 U.S. 257, 270 (1960); *Draper v. United States*, 358 U.S. 307, 310-13 (1959).

In *Gates*, the Court further eased the task of law enforcement to obtain and sustain a search warrant. The Court held:

The task of the issuing magistrate is simply to make a practical common sense decision whether, given all the circumstances set forth in the affidavit before him including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a *fair probability* that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a '*substantial basis* for . . . conclud[ing]' that probable cause existed. 103 S.Ct. at 2332. (emphasis added).

A "substantial basis" that a "fair probability" existed that a search would be fruitful is not a difficult test to meet.

²¹Kamisar, Constitutional Law Symposium, *supra* note 8, at 34.

If there ever was a need for a reasonable good-faith exception in warrant cases there surely is none in the post-*Gates* era. *Gates*, in effect, expanded the "reasonable mistake" capability of the probable cause standard by accommodating significantly more mistakes in the warrant application. But, in the process, it has so eased the probable cause requirement, that a reasonable well-trained police officer executing a warrant lacking in probable cause cannot now act in a reasonable good-faith belief in the constitutionality of his search.²² A warrant without a "substantial basis" of a "fair probability" that contraband or evidence will be found is so "clearly lacking a basing in probable cause . . ." that a "'good faith' defense to invocation of the exclusionary rule" cannot be supported.²³ *Illinois v Gates*, 103 S.Ct. at 2345, n. 17 (White, J., concurring).

²²Otherwise, we are left to grapple with the concept of a "reasonable good-faith" belief in a warrant that lacks a "substantial basis" for a "fair probability" that contraband or evidence of crime will be found. Kamisar, Constitutional Law Symposium, *supra*, note 8 at 35. This is yet another example of the obfuscation of bright line articulation caused by a reasonable good-faith proposal.

²³Professor LaFave recently concluded:

But the essential fact of *Gates* is that it contemplates much greater deference at the suppression hearing and appellate review stages to the judgment of the officer or magistrate who made the initial probable cause decision. That being so, surely there is no need to engage in 'double counting' by first applying this less demanding test and then excusing supposedly 'good faith' deviation from it. If as *Gates* claims, probable cause is simply a 'common sense' matter, then any probable cause determination that is erroneous and thus lacking in common sense is undeserving of either the appellation 'good faith' or the sympathetic reception a 'good faith' exception would allow.

LaFave, *Supreme Court Report: Nine Key Decisions Expand Authority to Search and Seize*, 69 American Bar Association Journal 1740, 1748 (Nov. 1983).

Justice Stewart also recently wrote, with reference to a good-faith proposal, that:

if the proposal is to tolerate searches and seizures where, despite the deference given to the magistrate's determination (citation omitted), a reviewing court cannot conclude that the police officer had probable cause — even while giving the officer the benefit of the doubt where he reasonably relied on a mistaken view of the law or the facts — it approaches the 'subjective' good faith approach condemned by the Supreme Court nearly twenty years ago in *Beck v. Ohio* [379 U.S. 89, 97 (1964)].

Stewart, *supra*, 83 Colum L. Rev. at 1401.

C. In Recent Decisions The Court Has Limited The Applicability Of The Exclusionary Rule By Restricting The Scope Of The Fourth Amendment And Narrowing The Circumstances In Which The Rule May Be Invoked

In recent decisions, this Court has limited the applicability of the exclusionary rule in the Fourth Amendment context. This has occurred in two ways. First, the Court has restricted the types of governmental intrusions that are deemed Fourth Amendment violations; and second, the Court has narrowed the circumstances in which the exclusionary rule may be applied to exclude evidence obtained illegally. Though the impact of the Court's decisions is a weakening of the exclusionary rule, the Court has not obliterated the rule with the attendant consequences of nullifying the Fourth Amendment. Obliteration, however, is the inevitable result of petitioner's proposal, which should be rejected in light of the Court's more moderate and flexible approach.

1. *Restricting The Scope Of The Fourth Amendment.* In several recent cases, this Court has decided that certain invasions of privacy by law enforcement are not "searches" or "seizures" under the Fourth Amendment. Epitomizing this recent trend of the Court is Justice Rehnquist's pronouncement in *United States v. Knotts*, 103 S.Ct. 1081, 1086 (1983), that "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory facilities bestowed upon them at birth with such enhancement as science and technology afforded them in this case." In *Knotts*, the Court held that the police monitoring of a suspect for a considerable distance by means of a "beeper" (an electronic tracking device) until his car stopped at a cabin in a secluded area was neither a "search" nor a "seizure" under the Fourth Amendment. The majority took the position that such scientific enhancement could not be

distinguished constitutionally from visual surveillance.²⁴

The Court's restrictive interpretation of the right to privacy in *Knotts* was echoed in other recent decisions. For example, in *Smith v. Maryland*, 442 U.S. 736 (1979), the Court held that the use of a pen register to record numbers dialed from a suspect's home is not a "search" within the meaning of the Fourth Amendment. Although a list of numbers dialed from a private phone can reveal intimacies of personal life, the Court explained that telephone subscribers do not "harbor any general expectation that the numbers they dial will remain secret" (*id.* at 743). Similarly, in *United States v. Miller*, 425 U.S. 435 (1976), the Court held that a bank depositor has no "legitimate expectation of privacy" as to checks and deposit slips voluntarily proffered to the bank. The Court explained that such documents can be subjected to government subpoena because, as with phone calls dialed on a private telephone and revealed by the phone company to the government, the depositor runs the "risk" that the bank will present his records to the government. In the Court's view, both the bank depositor and the telephone subscriber surrender their privacy interests.

In addition, in other recent decisions, the Court has approved warrantless police searches based on less than probable cause in the automobile context. For example, in *Michigan v. Long*, 103 S.Ct. 3469 (1983), the Court, extending its holding in *Terry v. Ohio*, 392 U.S. 1 (1968) to a vehicle search, held that a weapon search could extend to the passenger compartment of a car not occupied by the suspect absent probable cause to arrest him. Furthermore, in *New York v. Belton*, 453 U.S. 454 (1981), the Court further eased the burden of police to obtain a warrant for the search of containers seized from stopped vehicles. The Court held

²⁴However, as recognized by the concurrence, the majority position was a marked departure from the Court's decision in *Katz v. United States*, 389 U.S. 347 (1967). *Knotts*, 103 S.Ct. at 1089 (Stevens, J., concurring). See, LaFave, *supra*, 69 American Bar Association Journal at 1740 ("the Court often has taken an exceedingly narrow view of *Katz*").

that as long as the police have probable cause to arrest the car's occupants, the police may conduct a warrantless search of the car's interior, including closed containers, even though the occupants are handcuffed and surrounded by the police outside the car, and even if the officer lacks probable cause to believe the car contains evidence of crime. Also in *United States v. Ross*, 456 U.S. 798 (1982), the Court, in effect reversing its recent decision in *Robbins v. California*, 453 U.S. 420 (1981), extended the "automobile exception" to the warrant requirement. It held that the police may conduct a warrantless search of a closed container found in a locked car trunk if they had probable cause to believe the car contained evidence of crime.²⁵

2. *Narrowing The Circumstances Where The Exclusionary Rule May Be Applied.* Although recognizing a violation of constitutional rights, the Court has restricted use of the exclusionary rule in certain proceedings or for certain purposes and to certain individuals. Although none

²⁵In other circumstances the Court has reaffirmed the Fourth Amendment requirement that no search or seizure be made without a warrant based on probable cause. See, e.g. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (privacy interference and Fourth Amendment violation to stop car without articulable and reasonable suspicion); *Dunaway v. New York*, 442 U.S. 200, 216 (1979) (detention for custodial interrogation violates interests protected by the Fourth Amendment); *Payton v. New York*, 445 U.S. 573, 601 (1980) (warrantless entries into homes violates "overriding respect for the sanctity of the home"); *United States v. Chadwick*, 433 U.S. 1 (1977) (sufficient privacy interests in personal effects, placed inside double-locked footlocker to entitle Fourth Amendment protection).

Under our present system, the Court is afforded needed flexibility in deciding whether a Fourth Amendment violation has occurred. In those situations where the Court has opted to limit the privacy right, it has, therefore, foreclosed applicability of the exclusionary rule. On the other hand, where the Court has found a Fourth Amendment violation, it has employed the exclusionary rule to enforce its ruling. However, under a good-faith process, the Court's decisions in such cases as *Prouse*, *Dunaway*, *Payton*, and *Chadwick* among others, may never have occurred, as police could act under a reasonable mistake where such actions were not foreseeably Fourth Amendment violations (See pages 17-18, n. 7, *supra*). It appears that the Court's method of controlling applicability of the exclusionary rule is exceedingly more appropriate than the inflexible solution tendered by petitioner.

of these restrictions apply directly to proof of an accused's guilt in the trial setting, they, nevertheless, impact indirectly to weaken the rule. This has, in turn, had the unfortunate result of providing more incentive for police to violate the Fourth Amendment.

For example, the exclusionary rule may no longer be applied in certain proceedings collateral to the actual criminal trial. Unlawfully-seized evidence is not admissible in grand jury proceedings,²⁶ and in civil proceedings to collect federal wagering taxes when the illegal search was conducted by state officials.²⁷ Also, a state prisoner may not be granted federal habeas corpus relief on search and seizure grounds unless he has been denied "an opportunity for full and fair litigation" of the claim in the state courts.²⁸ Moreover, in the criminal trial itself, the exclusionary rule may not be used to bar the introduction of illegally-seized evi-

²⁶*United States v. Calandra*, 414 U.S. 338, 349 (1974). Professor LaFave has argued that the Court's decision in *Calandra* has distinguished *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391-92 (1920) (grand jury may not subpoena documents when knowledge of their existence and contents derived from illegal search) "out of existence." I W. LaFave, *Search and Seizure: a Treatise on the Fourth Amendment*, §1.4 at 64 (1978).

²⁷*United States v. Janis*, 428 U.S. 433, 454 (1976). In this case, the majority emphasized that any deterrent effect in excluding evidence seized by the state police for use in a federal proceeding was "highly attenuated" (*id.* at 458). Justice Stewart pointed out in dissent, however, that deterrence was pronounced since the federal and state officials had a relationship of "mutual cooperation and coordination" (*id.* at 462). In couching Justice Stewart's point somewhat differently, Professor Kamisar explained, "by ruling that evidence obtained unconstitutionally by local police is admissible in a federal civil proceeding in *Janis*-type circumstances, the Court failed to eliminate a significant incentive to violate the Fourth Amendment when local and federal authorities are working closely together." Kamisar, *Constitutional Law Symposium*, *supra* note 8 at 43. Indeed, state and federal officials can combine efforts in criminal cases as the combination of state police, state judge authorizing a search warrant and federal prosecutors pursuing a federal indictment in the instant case.

²⁸*Stone v. Powell*, 428 U.S. 465, 493-94 (1976). "*Stone v. Powell* all but explicitly overruled *Kaufman v. United States*, 394 U.S. 217, 228 (1969) (vindication of prisoner's constitutional rights outweighs value of finality in criminal judgments)." Mertens and Wasserstrom, *supra*, 70 *Geo. L.J.* at 388, n. 109.

dence to impeach the defendant's testimony.²⁹ Finally, a new Fourth Amendment decision will have no retroactive application even to cases pending direct review at the time of the decision.³⁰

Not only has the Court limited application of the exclusionary rule in certain proceedings and for certain purposes, it has restricted its use to certain defendants in a criminal proceeding. In *Alderman v. United States*, 394 U.S. 165 (1969), the Court, rejecting the defendants' request to eliminate the standing requirement, held that a motion to suppress unconstitutionally-seized evidence can be "successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence" (*id.* at 171-72). The defendants had argued that the standing doctrine was inconsistent with the deterrence rationale of the exclusionary rule and encouraged police to violate the rights of third parties to obtain evidence on targets. The danger envisioned

²⁹*United States v. Havens*, 446 U.S. 620, 627-28 (1980). *Havens*, in effect, permits the use of illegally-seized evidence for impeachment virtually every time a defendant testifies. This encourages police to conduct unconstitutional searches, if for no other reason, to store up evidence to be used for impeachment, even though not admissible in the prosecution's case-in-chief. The Court's decision in *Havens* is similar to its earlier decision in *Harris v. New York*, 401 U.S. 222, 225-26 (1971) where the Court held that although the defendant's prior inconsistent statements were inadmissible in the prosecution's case-in-chief under *Miranda v. Arizona* (1966) 384 U.S. 436, such statements could be used for impeachment. The problems created by *Harris* pertaining to deterrence apply also to *Havens*. See Dershowitz and Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 Yale L.J. 1198 (1971).

Also, with reference to the criminal trial itself, the Court may have recognized the "doctrine of inevitable discovery." In *Brewer v. Williams*, 430 U.S. 387, 406, n. 12 (1977), the Court suggested that illegally-seized evidence may be admissible at trial on the ground that its discovery was inevitable absent police misconduct. Professor Saltzburg has cautioned that the "doctrine of inevitable discovery presents perhaps the greatest potential for creating incentives for unconstitutional police conduct." Saltzburg, *Foreword: The Flow and Ebb of the Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 Geo. L.J. 151, 195 (1980).

³⁰*United States v. Peltier*, 422 U.S. 531, 538-39 (1975).

by the standing opponents was borne out in *United States v. Payner*, 447 U.S. 727 (1980). In that case, the trial court found that the government "affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties." 447 U.S. at 730. Although under such circumstances, the application of the exclusionary rule would have had a deterrent effect on government misconduct, the Court, nevertheless, held that a federal court could not exercise its supervisory powers to exclude the evidence. Since *Alderman*, the Court has solidified the standing doctrine as a means of depriving defendants of the availability of the exclusionary rule.³¹

In each of these circumstances, collateral to proof of guilt at trial, the Court has deemed application of the exclusionary rule inappropriate as the loss of deterrence seemed marginal. Yet, the cumulative effect of these decisions on the deterrence of unconstitutional police conduct is significant. As the police are aware of an increasing number of approved uses of evidence seized illegally, they are more willing to risk violating the Fourth Amendment. "If, for example, the police unlawfully stop and search a car and its occupants, it is likely that some of the passengers would not have

³¹See *Rakas v. Illinois*, 439 U.S. 128 (1978) (car passengers lack "standing" to contest the legality of car search); *United States v. Salvucci*, 448 U.S. 83 (1980) (overruling automatic standing doctrine of *Jones v. United States*, 362 U.S. 257 (1960) when defendants charged with crimes of possession); *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (apparently rejected well-settled principle that a possessory interest in the seized items suffices to establish standing).

Indeed, in the instant case, the district court found that certain defendants lacked standing to raise Fourth Amendment objections to various searches (J.A. 127-29). For example, the court held that respondent Del Castillo had no standing to object to any of the residence searches or vehicle searches other than the search of his own vehicle. Yet, as argued to the trial court to persuade it to apply California standing rules, under California's vicarious standing doctrine, the respondents would have been afforded the right to object to all illegally-seized evidence to be used against them at trial. See *People v. Gale*, 9 Cal.3d 788, 793 (1973).

standing to challenge admission of unlawfully seized evidence, or that the evidence will be admitted either to impeach the testimony of a defendant, or to secure an indictment in a grand jury proceeding. Although police may not be thinking about any particular one of these permissible collateral uses of unlawfully-seized evidence, they may well go ahead with the unlawful search, confident that in one way or another it is likely to pay off." Mertens and Wasserstrom, *supra*, 70 Geo. L.J. at 388. Indeed, the "existence of a broad class of exceptional cases serves to create significant disincentives for law enforcement obedience to strict fourth amendment constraints." Burkoff, *The Court that Devoured The Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 Ore. L. Rev. 151, 153 (1979).

We are fast approaching the point where so many incentives for obtaining evidence illegally are available that the exclusionary rule can no longer meaningfully deter police misconduct. Each time the Court deems that the "costs" of the rule outweigh its "benefits" in collateral proceedings, it diminishes the continued benefits of the rule in the trial setting itself. Each time the exclusionary rule is not available to exclude use of illegally-seized evidence, it encourages officers to violate the Fourth Amendment and take a chance that the fruits of their misconduct will be used in some fashion by the prosecuting authorities.

Although the good faith proposal may have had some validity in years past,³² its time has come and gone. The

³²Professor Kamisar recently observed:

There might have been a need for a good faith test right after *Mapp* or just before the "stop and frisk" cases — or before the Court loosened the concept of "consent" — or before it adopted "bright line tests" . . . favoring the police (especially automobile search cases), or before it diluted the standard of probable cause in *Gates*, or before it took such a crabbed view of what constitutes a "search" in the "pen register" and "beeper cases" — or before it began narrowing the thrust of the exclusionary rule in the 1970s. But I submit that in the year 1983 the protections afforded by the Fourth Amendment have been so weakened and the exclusionary rule itself so bruised and battered that *the last thing* we ought to do is take another bite out of it by adopting a "good faith" or a "good faith, reasonable belief" exception.

Kamisar, Constitutional Law Symposium, *supra* note 8 at 45-46.

proposal is both unnecessary and cost-ineffective, as the deterrent benefits of the exclusionary rule are worth preserving, though diminishing in strength.

D. The Practical Application Of A Good-Faith Test Would Promote Police Ignorance And Impose An Administrative Burden On Suppression Judges

Petitioner contends that the exclusionary rule's deterrent purpose would not be served by excluding evidence seized by a police officer acting with a reasonable, but mistaken, belief that his conduct complied with the Fourth Amendment. Precisely what constitutes a "reasonable belief" and how such a standard would be litigated in suppression hearings raises serious conceptual and practical problems.

Conceptually, the reasonable mistake proposal ignores the "systemic deterrence" provided by the exclusionary rule (see pages 50-56, *infra*) and narrowly focuses on only the police officer in question. Because the reasonableness of that officer's actions would be determinative, the more ignorant the officer is of the applicable law, the more likely would his unconstitutional acts be deemed reasonable. As a former prosecutor has noted, a reasonable good-faith exception to the exclusionary rule would "put [] a premium on 'police ignorance.'" Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, 1 Crim. Just. Ethics, 28, 32 (1982); Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1044 (1974) (police department dedicated to crime control would have incentive to leave its officers uneducated about law so that constitutional violations could be labeled inadvertent).

Apparently recognizing this problem, petitioner has proposed adoption of an "objective reasonableness" standard (Pet. Br. 78-79). That is, rather than focusing on the subjective intent of the particular officer, the court would determine whether the officer's actions were objectively reasonable under the circumstances. Unfortunately, the proposal would not only fail to cure the problem, it would create an

intolerable administrative burden on suppression judges.

Focusing the inquiry on the objective reasonableness of the officer's actions would not eliminate the subjective component of the analysis. The officer would inevitably be asked to explain why he acted unconstitutionally in order for the court to determine if such was reasonable.³³ Inquiry would also be made of the "subjective states of mind of numerous people," *United States v. Peltier*, 422 U.S. at 560 (Brennan, J., dissenting), many of them law enforcement officials, in order to determine what a well-trained officer would be expected to do under the circumstances. Despite contrary intentions, the objective reasonableness test would promote "systemic ignorance" on the part of police departments, for it would be their training and experience that would determine reasonableness and the more ignorant police in general are of the law, the more reasonable would be the unconstitutional acts of their fellow officers.

The application of the objective reasonableness test would exert extreme administrative burdens on suppression judges. The defendant would seek to prove that the executing officer acted in bad faith, by showing that the officer had adequate training to know that his actions were unlawful, or that he acted unreasonably, by demonstrating the inadequacy of the officer's training in light of what would be expected of the well-trained police officer.³⁴ To accomplish this objective,

³³A subjective inquiry would seem necessary, if inducing police to comply with the Fourth Amendment is the goal. In warrant cases, the degree to which the particular officer applying for the warrant employed judge-shopping would bear on his good-faith intentions. For example, if Officer Rombach's warrant application had been rejected by five judges before finally signed by Judge Murphy, would not the ensuing search be objectively unreasonable? Or, if Officer Rombach had employed forum-shopping to avoid application of California's vicarious standing doctrine to the state search in question, would not this demonstrate his bad-faith attempt to manipulate the warrant process? Unfortunately, since good faith was not litigated below, such inquiries were not made of Officer Rombach.

³⁴Exactly what is to be expected of a well-trained officer is a difficult determination. Should the suppression judge use a national standard or local one? Should the judge consider that police departments serving a lightly-populated area lack budgets to train their officers as well as a department of a major city with a larger tax base and more funds for police education?

the defendant would likely call as witnesses the police brass in charge of training and continuing education,³⁵ and other participants in the criminal justice process, such as law professors and criminal law practitioners.³⁶ With the calling of such witnesses, "suppression hearings, which opponents of the exclusionary rule criticize for consuming precious court time, will seem positively fleeting by comparison to

³⁵Moreover, the insertion of testimony from police officers as an additional component in suppression hearings would present further problems. As this Court recognized, "sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources." *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting). Not only would such an exercise prove unduly burdensome for the courts, it would introduce into the suppression hearing a factual issue on which evidence will be "difficult to come by apart from the officer's self-serving and generally uncontradicted testimony." Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1045 (1974); see LaFave, *The Fourth Amendment In An Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307, 356 (1982); Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Crim. 635, 655 (1978) (the court is unlikely to have anything before it other than the officer's assurance that he was convinced he had probable cause and that this "testimony, whether truthful or perjured, is almost impossible to refute.")

In view of the fact that trial judges are adverse to suppressing probative evidence, they will inevitably cling to objective reasonableness as a means of avoiding suppression. And even judges sensitive to Fourth Amendment issues, when faced with a reasonableness test, would defer to the police and rule on the side of reasonableness. Mertens and Waserstrom, *supra*, 70 Geo. L.J. at 449 ("We can expect, then, to find, judge's thumbs on the reasonableness side of any sliding scale"); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 394 (1974) (With a reasonableness test, in practice, "appellate courts defer to trial courts and trial courts defer to the police").

³⁶No such good faith hearing occurred in the trial court in the instant case. The suppression hearing below pertained only to the probable cause determination and whether the officers complied with the California "knock notice" provision when executing the warrant. The issue of good faith was raised by the government as an after-thought in argument after the court had found the warrant defective. In fact, the trial court denied the respondents an opportunity to inquire about the informant referred to in the warrant application — an inquiry, undoubtedly pertinent to the issue of good faith to determine whether the officer acted reasonably in seeking a warrant based on the informant. Without such a hearing below, respondents submit, there is no basis to conclude the officers' actions were taken in good faith.

those born of the good faith exception." Mertens and Wasserstrom, *supra* 70 Geo. L.J. at 448.

Apparently recognizing the need for judicial review of some probable cause determinations, petitioner acknowledges that suppression may be justified in cases where the magistrate's ruling was egregious or the police acted in bad faith in applying for the warrant (Pet. Br. 65). Under such a formulation, an additional issue in suppression hearings will become, not whether, but the degree to which the magistrate's belief in the reasonableness of the search was unreasonable — was it moderately unreasonable or egregiously unreasonable? Suppression judges will be asked to engage in a cumbersome and time-consuming determination of what a reasonably competent magistrate would have decided or the extent to which probable cause was lacking in the warrant application. Moreover, the new inquiry would serve to modify the probable cause standard. Instead of prohibiting unreasonable searches as defined by probable cause, courts would be permitted to sustain unreasonable searches as long as they were not egregiously unreasonable. This dilution of probable cause would have the drastic effect of rewriting the Fourth Amendment.

E. Modification Of The Exclusionary Rule Should Be A Legislative, Not Judicial, Undertaking

The task of modifying the exclusionary rule, if such an objective be sought, is more appropriately delegated to the legislature. Proposed modifications of the exclusionary rule have already been the topic of congressional debate.³⁷ In-

³⁷ Legislation was introduced in both the 97th and 98th Congresses which would eliminate entirely the exclusionary rule in federal criminal proceedings and substitute a right of action directly against the federal government under the Federal Tort Claims Act. S 283, 98th Cong., 1st Sess. (1983); S 751, 97th Cong., 1st Sess. (1981). Furthermore, during the last session of Congress, the Subcommittee on Criminal Law of the Senate Committee on the Judiciary held hearings on legislation creating a good-faith exception, (The Exclusionary Rule Bills 1981-1982; Hearings on S. 101, S. 751 and S. 1995, 97th Cong., 1st and 2nd Sess.) (hereinafter referred to as "Hearings") and similar bills were introduced in the 98th Congress. See H.R. 2239, 98th Cong., 1st Sess (1983); S. 101, 98th Cong., 1st Sess. (1983). Indeed the hearing procedure permitted by congressional debate is necessary to have a full airing of views.

deed congressional debate, not appellate argument before this Court, seems the most efficacious way to conduct full review of the exclusionary rule. First, all proposed modifications of the rule can be discussed, not simply the one proposed here by petitioner. Moreover, empirical studies relied upon by petitioner can be analyzed more meaningfully by hearing live testimony from social scientists rather than having this Court delve into written studies reaching conflicting results. In addition, congressional modification of the rule would serve an important policy function. In opposing outright judicial elimination of the rule, Chief Justice Burger articulated:

Obviously, the public interest would be poorly served if law enforcement officials were suddenly to gain the impression however erroneous, that all constitutional restraints on police had somehow been removed — that an open season on ‘criminals’ had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases.

Reasonable and effective substitutes can be formulated if Congress would take the lead, as it did for example in 1946 in the Federal Tort Claims Act. I see no insuperable obstacle to the elimination of the suppression doctrine if Congress would provide some meaningful and effective remedy against unlawful conduct by government officials.

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 421 (1971) (Burger, C.J., dissenting).

In sum, Congress should be permitted to continue the exclusionary rule debate and formulate new legislation on the issue.³⁸ Then, if necessary, this Court may be asked to rule on the constitutionality of the provision. But in that

³⁸*Wolf v. Colorado*, 338 U.S. 25, 40 (Black, J., concurring) (the exclusionary rule “is a judicially created rule of evidence which Congress might negate”) (emphasis added).

eventuality the issue for the Court will be much narrower and confine itself to a particular statute. In contrast, the issue now before the Court requires it to, in effect, write the statute itself — an undertaking more appropriately left to the Congressional pen.

IV. A COST-BENEFIT ANALYSIS OF THE EXCLUSIONARY RULE SHOWS MORE BENEFIT THAN COST

A. The Exclusionary Rule Not Only Deters Police Misconduct, It Furthers Compliance With The Fourth Amendment By Creating “Systemic Deterrence”

Petitioner has assigned the burden of proving empirically the deterrent effect of the exclusionary rule on those who support the rule's continuation. This Court recognized more than twenty years ago the unavailability of empirical data to prove deterrence, explaining:

[e]mpirical studies are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained. *Since as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data could ever be assembled.* (emphasis added)

Elkins v. United States, 364 U.S. 206, 218 (1960). More recently, the Court noted the virtual impossibility of the empirical task. In *United States v. Janis*, 428 U.S. 433, 450-51 (1976), it explained:

[a]lthough scholars have attempted to determine whether the exclusionary rule in fact does have any deterrent effect, each empirical study on the subject, in its own way, appears to be flawed. It would not be appropriate to fault those who have attempted empirical studies for

their lack of convincing data.³⁹

“Obviously the assignment of the burden of proof on an issue where evidence does not exist and cannot be obtained is outcome determinative.” Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 Ind. L.J. 329, 332-33 (1973). As Professor Canon concluded, the assignment of the burden to prove the deterrence capability of the exclusionary rule “is little more than the adoption of an old ‘debaters trick’ where when nothing can be proven either way, the first debater vigorously asserts that it is incumbent upon the second debater to prove his arguments.” Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument For Its Retention*, 23 S. Tex. L.J. 559, 564 (1982).⁴⁰

³⁹The Court in *Janis* explained that the collection of empirical data is prevented by several factors: the number of variables is substantial and many cannot be measured or effectively controlled; recordkeeping before *Mapp* was spotty, and controlled-studies after *Mapp* not possible; response studies are hampered by respondent's interests; and, finally, extrapolation studies are inconclusive due to changing circumstances. 428 U.S. at 452-53. Moreover, even the study by Professor Oaks, (Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970)), cited by petitioner as the “leading empirical study on the question” (Pet. Br. 41) ultimately determined that no conclusive results could yet be formulated from existing data about the rule's deterrent effect.

⁴⁰In addition, as Professor Goodpaster noted, Criticism of the exclusionary rule for failure to deter is misleading; it assumes we should adopt only those rules that are demonstrably effective. In this it neglects analogous applications of criminal law. For example, it is unknown whether the death penalty deters the commission of crimes [see, *Gregg v. Georgia*, 428 U.S. 153, 185 (plurality opinion) (“no convincing empirical evidence either supporting or refuting [deterrence]”), yet there is a death penalty. Similarly, it is unknown whether, or to what degree, the prosecutions and punishments of the criminal code deter, yet they are not eliminated because it has not been proven that they deter.” Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hast. L.J. 1065, 1084 (1982). See Canon, *supra*, 23 S. Tex. L.J. at 564-65 (“Social science research is simply not advanced enough to come to very precise conclusions about the impact of most public policies — not just the exclusionary rule”).

Despite the unavailability of empirical data, experience with the exclusionary rule demonstrates that it does have a deterrent effect on police conduct. The dramatic increase in the use of search warrants in the post-*Mapp* years indicates that the Court's decision impacted on police practices. See Melner, *Supreme Court Effectiveness and the Police Organization*, 36 L. & Contem. Prob. 467, 475 (1971). Furthermore, the rule has caused police departments to increase training of their officers to effectuate compliance with the Court's Fourth Amendment decisions. See Edwards, *Law Enforcement Training in the United States*, 3 Am. Crim. L.Q. 89, 90 (1965) (FBI held over 600 training schools for state and local police officers between date of *Mapp* decision in 1961 and 1965). Moreover, the rule has also encouraged working relationships between police and prosecutors to ensure that evidence is obtained in ways not resulting in its suppression. See Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. Crim. L., Crim. & P.S. 171, 179-82 (1962). Indeed, in recent testimony, the Attorney General of Maryland, a former United States Attorney, stated in reference to modification of the exclusionary rule, that "[e]xclusion from evidence is almost certainly in my judgment the only deterrent in the vast majority of unconstitutional intrusions." Hearings, *supra* note 37 at 19 (Statement of Stephen H. Sachs). Finally, Justice Potter Stewart, after recognizing the aforementioned impact of the rule, concluded "[t]hat fourth amendment violations nevertheless occur does not suggest that the exclusionary rule is ineffective; instead it suggests that continued vigilance by the courts is necessary to ensure that the rule . . . [is] faithfully applied." Stewart, *supra* 83 Colum L. Rev. at 1396.

After accepting as "intuitively plausible" (Pet. Br. 41) that suppression of evidence can deter police misconduct, petitioner calls for a "focused exception" (Pet. Br. 45) to the exclusionary rule. It argues that "[t]here is no basis for faulting an officer who has made a reasonable but incorrect assessment regarding the existence of . . . probable cause

or the necessity of obtaining a warrant," (Pet. Br. 51) and, therefore, in such cases, suppression would not achieve deterrence. If this type of "specific deterrence" (that focusing on the individual officer) was the only, even the most significant, type of deterrence created by the exclusionary rule, petitioner's argument may have some merit. However, the effects of the exclusionary rule are systemic and are linked directly to the widespread enforcement of the Fourth Amendment itself.

A fundamental shortcoming of the good-faith proposal is that it shortchanges the effect of the exclusionary rule on furthering Fourth Amendment compliance. It is true, as petitioner contends, that an individual officer acting in reasonable good faith should not be faulted for his unconstitutional conduct. But the concern for deterrence of unconstitutional conduct does not stop with that officer. The deterrence accomplished by the exclusionary rule is one of "systemic deterrence" — deterrence of all law enforcement officers, of magistrates and of prosecutors from pursuing actions violative of the Fourth Amendment. The exclusionary rule serves to implement and develop the teaching of the Fourth Amendment throughout the criminal justice system.⁴¹

The concept of systemic deterrence is rooted in the justifications given by this Court for the exclusionary rule

⁴¹See Mertens and Wasserstrom, *supra* 70 Geo. L.J at 394-405; Justice Stewart concurs that "the rule is designed to produce a 'systematic' deterrence." "Stewart, *supra*, 83 Colum. L. Rev. at 1400. The concept was adopted and articulated by another commentator in criticizing the reasonable good-faith belief standard:

Thus far we have considered the reasonable good-faith belief standard as if the only party subject to deterrence were the offending officer. This is, of course, too simplistic a view. Other officers, superiors and law enforcement institutions themselves are targeted by the exclusionary rule. Thus, to the extent that the rule affords an impetus toward litigating the contours of the Fourth Amendment and serves as the occasion for a court pronouncement on the same application of the rule may be said to deter violations. Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. Crim. L. and Criminology 875, 898 (1982).

through the years. In *Elkins v. United States*, 364 U.S. 206, 223 (1960), the Court emphasized "the imperative of judicial integrity" (emphasis added), explaining that the courts should not become "accomplices in the wilful disobedience of a Constitution they are sworn to uphold." This concern that the judicial process not countenance unconstitutional conduct was further articulated in *Terry v. Ohio*, 392 U.S. 1, 13 (1968) where the Court explained:

Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Moreover, the Court has also justified the rule in terms of preventing those who *execute* the laws from benefiting from unlawful conduct. A purpose of the exclusionary rule is that "of assuring the people — all potential victims of unlawful government conduct — that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government." *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). This sentiment was expressed in *Weeks* where the Court declared:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts . . .

To sanction such proceeding would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibition of the Constitution, intended for the protection of the people against such unauthorized action.

Weeks, 232 U.S. 383, 392. See *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) ("no man is to be convicted on unconstitutional evidence.").

In recent decisions, the Court has combined these justifications for the exclusionary rule into its concept of deterrence. It explained in *United States v. Janis*, 428 U.S. 433 (1976):

The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the court must not commit or encourage violations of the constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. The focus therefore must be on the question whether the admission of the evidence encourages violation of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose (*id.* at 458-59, n. 35) (citations omitted).

Thus, the Court is not merely concerned with the deterrence of the individual officer making the search or seizure; it is concerned with systemic deterrence of violations of Fourth Amendment rights to preserve the integrity of the courts and maintain popular trust in government.⁴²

In warrant cases, the exclusionary rule promotes compliance with the probable cause requirement of the Fourth Amendment and is the mainspring of an effective warrant issuance system. For example, the magistrate scrutinizes

⁴²An example of systemic deterrence is the response to the Court's decision in *Delaware v. Prouse*, 440 U.S. 648 (1979). In *Prouse* the Court ruled that the police may not stop a car on the open road for a license or registration check, in the absence of articulable suspicion to believe in the presence of criminal activity. The institutional response to the decision was significant, as law enforcement agencies modified their practices to avoid suppression of valuable evidence. In dramatic fashion, the exclusionary rule "prevents countless abridgements of fourth amendment rights through law enforcement's institutional response to changes in fourth amendment law". Mertens and Wasserstrom, *supra*, 70 Geo. L.J. at 400-401.

the warrant application, not simply because of his professional responsibility to reach a "correct decision," (Pet. Br. 60) but because his decision concerning probable cause may be reviewed on a suppression motion. Further, the magistrate knows what is "correct" because of the existence of appellate court decisions made possible by an exclusionary rule. Similarly, precisely because police are determined to have their searches survive a suppression motion, and because they know that the magistrate's decision will be subject to judicial review, they take care to obtain probable cause before conducting a search. When, as in the instant case, evidence is suppressed due to lack of probable cause, all magistrates and police who come to learn of the decision will modify their acts accordingly in future cases. Magistrates will be more fully informed as to what constitutes probable cause, and the police will seek to obtain more evidence of crime before applying for the warrant. The end result is systemic deterrence of Fourth Amendment violations "by removing the incentive to disregard [the Amendment]". *Stone v. Powell*, 428 U.S. 465, 492 (1976).

B. The Exclusionary Rule Is The Only Effective Means To Ensure Fourth Amendment Compliance

The exclusionary rule gives teeth to the Fourth Amendment. To acknowledge that the Constitution forbids search warrants to issue on less than probable cause, but then to permit admission of evidence obtained in violation of the constitutional prohibition is effectively to protect "the right of the people to be secure" only procedurally, not substantively. See *Aguilar v. Texas*, 378 U.S. 108 (1964); *Nathanson v. United States*, 290 U.S. 41 (1933). A constitutional rule without an enforcement mechanism amounts to empty rhetoric.

The lesson gleaned from the experience in states without the exclusionary rule in the years between *Wolf* (338 U.S. 25 (1949)) and *Mapp* (367 U.S. 643 (1961)) is instructive. The California Supreme Court concluded that it was com-

pelled to adopt the exclusionary rule "because other remedies have completely failed to secure compliance with the constitutional provisions. . . ." *People v. Cahan*, 44 Cal.2d 434, 445 (1955). This Court further noted in *Mapp* that the "experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the fourth amendment to the protection of other remedies has, moreover, been recognized by this Court since *Wolf*." *Mapp*, 367 U.S. at 652-53. See generally Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L.J. 319, 323-24 (in states without an exclusionary rule egregious and premeditated official misconduct persisted, and neither the "internal discipline" of the police nor "the eyes of an alert public opinion" protected the citizenry). Finally, law enforcement authorities throughout the nation reacted to *Mapp* as if the Court had just created the Fourth Amendment, rather than merely decided to enforce laws always applicable to the states.⁴³

⁴³Police Commissioner Michael Murphy of New York observed:

I can think of no decisions in recent times in the field of law enforcement which had such a dramatic and traumatic effect as this . . . I was immediately caught up in the entire program of reevaluating our procedures which had followed the *DeFore* rule, and modifying, amending, and creating new policies and new instructions for the implementation of *Mapp* . . . Retraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen.

Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing"*, 62 *Judicature* 337, 347 (1979) (quoting Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 *Tex. L. Rev.* 939, 941 (1966)). Similarly, referring to the adoption of the exclusionary rule by the California Supreme Court, Los Angeles Chief of Police William Parker warned that the rule prohibited his officers from taking "affirmative action" in law enforcement unless and until they possessed "sufficient information to constitute probable cause." Kamisar, *Is the Exclusionary Rule An "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?* 62 *Judicature* 67, 72 (1979) (quoting W. Parker, *Police* 117, 131 (1957)). See also, *id.*, 62 *Judicature* at 70-72 (similar experience in Minnesota). Finally, with reference to search warrants, New York Deputy Police Commissioner Reisman commented:

(footnote continued on following page)

Although there are other remedies currently available for Fourth Amendment violations, only the exclusionary rule promotes police compliance with the constitutional mandate. One such remedy is criminal prosecution pursuant to 18 U.S.C. §242 (1976) for deprivation of constitutional rights. However, under *Screws v. United States*, 325 U.S. 91 (1945), only "wilful" deprivations can form the basis of prosecution. Because of the difficult burden of proof and harshness of the sanction, criminal prosecutions are rare. Another infrequently used remedy is a federal action seeking an injunction against Fourth Amendment violations by a law enforcement agency. Here, the moving party must overcome the heavy burden of proving the agency's "policy" of unconstitutional behavior (*Rizzo v. Goode*, 432 U.S. 362 (1976)), and the likelihood that such policy will inflict similar future injury (*City of Los Angeles v. Lyons*, 103 S.Ct. 1660 (1983)).

Although an action for damages against federal officials under the Fourth Amendment is available (*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)), it is not sufficient to enforce compliance with the Amendment. First, it is difficult to obtain a judgment against a police officer because he is immune from liability for actions reasonably taken in good faith (see, *Harlow v. Fitzgerald*, 102 S.Ct. 2727, 2738 (1982)) and juries are inclined to believe the testimony of law enforcement officials. Judgments against the governmental body are even more rare since liability occurs only when its "policies" give rise to the constitutional violation. *Monell v. Dep't. Soc. Services*, 436 U.S. 658 (1978). Furthermore, in

The Mapp case was a shock to us. . . . Before this nobody bothered to take out search warrants. Although the U.S. Constitution requires warrants in most cases, the U.S. Supreme Court had ruled [until 1961] that evidence obtained without a warrant — illegally if you will — was admissible in state courts. So the feeling was, why bother?

Kamisar, *supra*, 62 Judicature 337 at 349-50 (quoting N.Y. Times, April 28, 1965, p. 50).

cases as the instant one, where the magistrate errs on the probable cause determination, the magistrate is immune from a damage suit. *Stump v. Sparkman*, 435 U.S. 349, 362, n. 12 (1978). Damage actions do have the benefit of compensating victims of constitutional violations, but they are time-consuming, not readily available and rarely successful.

In sum, the available alternatives to the exclusionary rule cannot measure up to the task of ensuring Fourth Amendment compliance. Only the exclusionary rule can achieve that. Justice Stewart eloquently placed the alternative remedies in proper perspective:

Taken together, the currently available alternatives to the exclusionary rule satisfactorily achieve some, but not all, of the necessary functions of a remedial measure. They punish and perhaps deter the grossest of violations, as well as governmental policies that legitimate these violations. They compensate some of the victims of the most egregious violations. But they do little, if anything, to reduce the likelihood of the vast majority of fourth amendment violations — the frequent infringements motivated by commendable zeal, not condemnable malice. For those violations, a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the fourth amendment. There is only one such remedy — the exclusion of illegally obtained evidence.

Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1389 (1983).

C. The Alleged Costs Of The Exclusionary Rule Pale In The Face Of Its Substantial Benefits

1. Petitioner argues that the exclusionary rule deprives the courts of relevant and trustworthy evidence and therefore results in the freeing of guilty persons (Pet. Br. 68-70). Fundamentally, this argument is misdirected. It is not the

exclusionary rule, but the Fourth Amendment, which prohibits police from making unreasonable searches and seizures. In balancing the concern for privacy and the need for law enforcement embodied in the Fourth Amendment the founders recognized that police must be controlled even at the expense of truth-finding.⁴⁴ Moreover, critics of the exclusionary rule sometimes fail to recognize that the same relevant and trustworthy evidence would never have found itself into police hands had the officer complied with the Fourth Amendment in the first place.⁴⁵

In practice, the application of the exclusionary rule actually sets few criminals free. Empirical data support Professor LaFave's judgment that "the 'cost' of the exclusionary rule, in terms of acquittals or dismissed cases, is much lower than is commonly assumed." 1 W. LaFave, *Search And Seizure: A Treatise On The Fourth Amendment*, §1.2, n. 9 (Supp. 1982). Available data indicates the minimal

⁴⁴This sentiment was recently articulated by the Eighth Circuit:

A system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results. . . . Some criminals do go free because of the necessity of keeping government and its servants in their place. That is one of the costs of having and enforcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced.

Williams v. Nix, 700 F.2d 1164, 1173 (8th Cir.), cert granted, 103 S.Ct. 2427, case no. 82-1651 (1983). Justice Harlan described the judicial perspective: "We do not release a criminal from jail because we like to do so, or because we think it is wise to do so, but only because the government has offended constitutional principle in the conduct of his case." *Desist v. United States*, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting). See Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More Than "An Empty Blessing,"* 62 *Judicature* 337, 343-44 (1979) (Rule's opponents often confuse the exclusionary rule with the substantive law of search-and-seizure).

⁴⁵The Court has recognized this in cases addressing the "fruits of the poisonous tree doctrine," see *Wong Sun v. United States*, 371 U.S. 471, 484-86 (1963) and its progeny, e.g. *United States v. Ceccolini*, 435 U.S. 268 (illegally obtained evidence need not be excluded if the government can establish that the evidence would have been obtained in the absence of the illegal search).

impact of the rule in three respects: first, petitioner's assertions notwithstanding, prosecutions are declined for Fourth Amendment reasons in relatively few cases; second, in cases where suppression motions are filed, they are seldom granted; and third, the appellate courts render decisions on Fourth Amendment issues that are favorable to the prosecution in significantly more cases than those favorable to the defense.

With reference to cases declined for prosecution, a 1979 study conducted by the General Accounting Office found that of all cases declined for prosecution by United States Attorneys, Fourth Amendment issues were the primary reason in only 0.4% of the total.⁴⁶ Similar results have been obtained in studies made on the state level. An Institute for Law and Social Research (INSLAW) study revealed that in 1974 in the District of Columbia only 3.5% of all victimless crime arrests were not prosecuted for due process problems, only a part of which represented Fourth Amendment claims.⁴⁷ Also, an LEAA-funded study by Kathleen Brosi concluded that in 1977 prosecutions were declined on due process grounds (and less on search and seizure grounds) in victimless crime cases ranging from 1% of rejected cases in the District of Columbia, 2% in Salt Lake City, 4% in Los Angeles and 9% in New Orleans.⁴⁸ More recently, in 1980,

⁴⁶Comptroller General, U.S. General Accounting Office, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 14 (1979) (Rep. No. GGD-79-45) (hereinafter "GAO Study"). This study is particularly relevant here as the instant case involved a federal prosecution. Petitioner attempts to minimize the finding of the study by postulating that federal prosecutions are not declined because "relatively few federal cases involve manifestly illegal searches." (Pet. Br. 70 n. 34). However, petitioner seems to neglect the fact that Fourth Amendment issues may not be raised because the chance of success is minimal (see pages 62-63, *infra*).

⁴⁷Canon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S. Tex. B.J. 559, 573 (1982). Professor Canon estimated that only 2% of all persons arrested for victimless crimes were not prosecuted because of the exclusionary rule.

⁴⁸K. Brosi, *A Cross-City Comparison of Felony Case Processing*, 16, 19 (1979). Of more than 15,000 declinations for due process reasons, the study revealed that only one homicide and no rapes were involved.

California prosecutors dropped charges in 938 cases out of 40,451 narcotics arrests, or 2.3% of the cases due to search and seizure problems.⁴⁹ Finally, in a National Institute of Justice study of California prosecutions, search and seizure issues led the state to decline prosecutions in only 4.8% of its felony cases.⁵⁰

⁴⁹Davies, *Do Criminal Due Process Principles Make A Difference?* 1982 Am. Bar Foundation Res. J. 247, 265. It is noteworthy that petitioner cites only the National Institute of Justice Study (NIJ Study) on California prosecutions and makes no mention of this one. Petitioner also fails to mention more recent data on California disputing the NIJ claim that 30% of felony drug arrests were rejected for search and seizure reasons. See, Fyfe, *Enforcement Workshop: The NIJ Study of the Exclusionary Rule*, 19 Crim. Law Bull. 253 (1983).

⁵⁰National Institute of Justice, U.S. Dept. of Justice, *The Effects of the Exclusionary Rule: A Study in California* (1982) (NIJ Study). Petitioner cites the NIJ Study for three propositions: 4.8% of more than 4,000 felony cases were declined for prosecution on search and seizure grounds; 30% of felony drug arrests were declined on the same grounds; and the exclusionary rule frees the recidivist (Pet. Br. 70-71).

The reliability of the NIJ Study and petitioner's interpretation of it are suspect. First, it is noteworthy that the reported impact of Fourth Amendment concerns on declinations is markedly greater in the NIJ Study than in all other such studies, state and federal, including other California studies. Second, the study was conducted by the NIJ, purportedly a part of the Department of Justice, and in great haste (believed to have commenced in October and concluded in December 1982). Third, the claim that 4.8% were rejected on search and seizure grounds (itself not a substantial figure) is misleading; the relevant measure of the rule's cost is not what percent of *rejected* cases (86,033) were declined on Fourth Amendment grounds, but what percent of felony complaints (520,993) were so rejected. Kamisar, American Bar Association, Criminal Justice Section debate, 33 Cr. L. Rptr. 2404, 2408-12 (Aug. 17, 1983). The NIJ figures show that less than 0.8% of arrests made by police were reported by police and prosecutors as declined on such grounds. Furthermore, the finding that 30% of drug arrests were declined on search and seizure grounds is unreliable as the sample upon which the statistic is based (114) is too small to carry any statistical value — a point recently made by Judge Shirley Hufstедler (American Bar Association, Criminal Justice Section debate, 33 Cr. L. Rptr. 2404, 2410-12 (Aug. 17, 1983)). Finally the claim that the exclusionary rule causes recidivism is similarly meritless. The study looks at recidivism only in terms of crimes committed by those released due to case declinations. Neither the study nor petitioner included any comparative data on re-arrest rates for those with criminal records; and assuming that those who have previously been incarcerated commit more crime after release than those not incarcerated (an assumption commonly recognized by the criminal justice community), it would be equally reasonable to conclude that the exclusionary rule prevents crime.

The second classification of data revealing the minimal "costs" of the exclusionary rule is data indicating that suppression motions are seldom granted. For example, the GAO Study concluded that only 1.3% of the federal cases processed (36 of 2,804 cases) involved a successful Fourth Amendment suppression motion. Moreover, the study revealed that in about 50% of those cases where the motion was granted, the defendant was nonetheless convicted. GAO Study, *supra* note 46 at 11. Similarly, the often-cited study by Professor Oaks showed that in Washington, D.C. only in 4% of the narcotics cases did successful suppression motions occur and this happened in less than 1% of all other felony case categories. Further, in only about 50% of cases involving successful suppression motions were the charges dismissed. Oaks *supra*, 37 U. Chi. L. Rev., Table 7, at 686-87. See also, Davies, *supra*, 1982 Amer. Bar Assn. Res.J. at 265; K. Brosi, *supra* at 18-20. Indeed, in the instant case, the granting of the suppression motion was not only a rarity, but the district court's application of the standing doctrine to prevent challenge to certain of the searches may well permit the prosecution to obtain convictions despite the exclusion of evidence.⁵¹

Finally, appellate court decisions on suppression motions generally rule in favor of the prosecution. Though the available data is relatively scarce on this question, one study revealed that the California First District Court of Appeal reversed only 6% (8 of 151 cases) of trial court denials of suppression motions. On the other hand, the prosecution won reversal of eight trial court grants of suppression motions. See Davies, *supra* 1982 Am. Bar Foundation Res. J. at 266-67.

⁵¹Reported decisions substantiate that suppression does not necessarily lead to a failure of prosecution. The defendants in three cases heard by this Court — *Coolidge v. New Hampshire*, 403 U.S. 445 (1971); *Davis v. Mississippi*, 394 U.S. 721 (1969); and *Bumper v. North Carolina*, 391 U.S. 543 (1968); — were all convicted of heinous crimes on remand. Mertens & Wasserstrom, *supra*, 70 Geo. L.J. at 445-46.

To conclude, though the empirical data on the question of the degree to which the exclusionary rule frees the guilty is not absolutely conclusive, "virtually all of a growing body of evidence points to the conclusion that the rule has had only a very small impact in keeping seemingly guilty persons out of jail." Canon, *supra*, 23 S. Tex L.J. at 575.⁵² Indeed, recognizing the validity of this conclusion, Justice Stewart pronounced that "there is absolutely no evidence that the exclusionary rule is in any way responsible for the horrible increase in the crime rate in the United States in the last several decades." Stewart, *supra*, 83 Colum. L. Rev. at 1394.

2. Petitioner urges that the exclusionary rule serves to lessen public respect for the judicial system through its indiscriminate and disproportionate application (Pet. Br. 71-73).⁵³ If the public holds the exclusionary rule accountable for the woes of our judicial system (a proposition not demonstrated by petitioner), it suffers from a misperception. It is not the rule which makes the police conduct unconstitutional; rather, it is the Fourth Amendment, as interpreted by the courts of our nation, that does so. If evidence is

⁵²Moreover, in narcotics cases the government has devised its own methods to deter and punish illegal activity regardless of the effect of the exclusionary rule on the criminal prosecution. Under the civil forfeiture statutes, 21 U.S.C. §881 *et seq.* the Court can order the defendant to forfeit items of value which are used to facilitate a narcotics transaction. The government has used these statutes as an effective weapon against suspected narcotics violators. See, e.g. *United States v. One 1979 Mercury Cougar*, 666 F.2d 228 (5th Cir. 1982) (seizure of automobile that did not carry contraband but used merely to locate storage building); *United States v. One 1976 Porsche*, 670 F.2d 810 (9th Cir. 1979) (seizure of auto containing only small amount of marijuana).

⁵³With reference to its claim that the rule is not applied proportionately, petitioner notes that other countries have not adopted the rule. Justice Stewart refutes the need for proportionality, noting that "this disproportionality is significant only if one conceives the purpose of the rule as compensation for the victim. Because I view the exclusionary rule as necessary to preserve fourth amendment guarantees, I do not find this criticism persuasive." Stewart, *supra*, 83 Colum. L. Rev. at 1396. Also, the comparison with other countries is not well-founded. See Kamisar, *supra*, 62 Judicature at 348; see also Bradley, *The Exclusionary Rule In Germany*, 96 Harv. L. Rev. 1032 (1983).

excluded from a criminal prosecution (an infrequent occurrence, particularly in violent crime cases), it is because the police officer has overstepped the bounds of legality.

Furthermore, application of the exclusionary rule may not be popular at a time of increasing crime rates. But the unpopularity of judicial decisions has never been a sound reason to change them. As Justice Stewart recently recognized, “. . . there is . . . a need — one essential to the concept of an independent judiciary — to steel oneself against the inevitable tide of public comment directed at unpopular decisions.” Stewart, *supra*, 83 Colum. L.Rev. at 1392. Indeed, this Court has authored decisions which, though unpopular, were at the forefront of significant societal changes.⁵⁴

Finally, the virtual elimination of the exclusionary rule implicit in the good-faith proposal may severely weaken popular trust in government. “The exclusionary rule is important . . . as an official model of the government’s refusal to tolerate any police illegality.” Goodpaster, *An Essay on Ending the Exclusionary Rule*, 33 Hast. L.R. 1065, 1089 (1982). Because of this, the public feels more secure in their homes and papers. They also have more respect for our laws because they know that nobody, not even police officers, are above it. The symbolic impact of the rule is particularly germane to the instant case where the searches in question invaded the sanctity of the home and violated the very command of the Fourth Amendment prohibiting government intrusions on less than probable cause. Perhaps the duration of the exclusionary rule for seventy years speaks most convincingly of the public belief that, “if the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

⁵⁴E.g. *Roe v. Wade*, 410 U.S. 113 (1973); *Brown v. Board of Education*, 349 U.S. 294 (1955).

3. Petitioner further argues that the exclusionary rule burdens the judicial system by encouraging the filing of suppression motions, thereby diverting resources from criminal trials (Pet. Br. 74-76). This contention seems to condemn defendants for exercising their right to challenge the admission of unconstitutionally-seized evidence. Although the prospect of exclusion may make the motion worth the effort, without exclusion Fourth Amendment rights would not be enforced and articulated in court decisions. If petitioner seeks to conserve judicial resources through the adoption of a good-faith proposal, it neglects to recognize the expanded complexity and duration of suppression hearings likely to result from such a proposal. Moreover, the exclusionary rule may actually encourage dispositions without trial by causing both sides to reach a compromise settlement. Goodpaster, *supra* 33 Hast. L. Rev. at 1086. This, in turn, not only conserves judicial resources, but frees trial courts to hear cases of the innocent seeking vindication.

4. Another cost of the exclusionary rule cited by petitioner is the rule's failure to provide a remedy for the innocent victims of illegal searches and seizures (Pet. Br. 74). This argument does not suggest that the rule is not a necessary remedy to deter police misconduct; it only suggests that it is not a sufficient remedy. Innocent victims do have a tort remedy against the police for damages. *Bivens*, 403 U.S. 388. Perhaps, expanded victim compensation should be the focus of legislative debate in the Congress. But it is short-sighted to suggest that the rule affords no protection to the innocent. By enforcing the Fourth Amendment, the exclusionary rule decreases the amount of potential innocent victims by giving police reason to restrict their own intrusive activity.

5. Petitioner contends that the exclusionary rule tends to chill police investigation in the "gray areas" of the Fourth Amendment cases (Pet. Br. 73-74). Once again, this criticism is properly directed at the Fourth Amendment, not the exclusionary rule, for it is the Amendment which limits

police actions. The framers' command that no warrant issue but upon probable cause necessarily recognized that police officers who obey its strictures will inevitably catch fewer criminals. Indeed, this is the price paid for liberty and security of person, home and property. Furthermore, the very gravity of the sanction of exclusion may increase its deterrent capabilities. "To the extent that exclusion is perceived as a harsh sanction, it may provide a greater incentive for the police to comply with the fourth amendment." Stewart, *supra*, 83 Colum. L. Rev. at 1395. To, as petitioner proposes, permit police to invade privacy in the gray areas will only serve to make the Fourth Amendment itself a gray area.

6. Finally, petitioner claims that the exclusionary rule threatens the Fourth Amendment because judges are reluctant to condemn police practices if such will free guilty defendants (Pet. Br. 76-77). It is curious that petitioner makes this claim in light of its previous argument that the rule frees guilty defendants. Although suppression motions are seldom granted, through the years courts have excluded evidence, when merited, such that a whole body of Fourth Amendment law has been promulgated by this and other courts throughout the system. Moreover, in those cases where courts decline to exclude evidence in the face of contrary legal precedent, they are law-breakers like the police who committed the unconstitutional search or seizure. The Fourth Amendment is not threatened by the exclusionary rule; it is enforced by the rule. Rather, the Fourth Amendment is threatened by police who invade privacy in violation of the Amendment and courts, hopefully few, which ignore the dictates of the Amendment and render decisions contrary to law.

CONCLUSION

The Court is respectfully requested to affirm the judgments under review.

Respectfully submitted,

JAY L. LIGHTMAN

ROGER L. COSSACK

Counsel for Respondents

Sanchez, Stewart and Del

Castillo

NOVEMBER 1983

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IN THE SUPREME COURT OF THE UNITED STATES

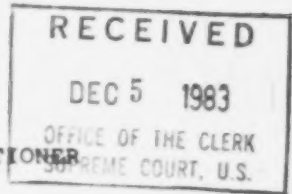
OCTOBER TERM, 1983

No. 82-1771

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL.



ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

APPLICATION FOR MODIFICATION OF THE
COURT'S ORDER AUTHORIZING TWO COUNSEL
TO PRESENT ORAL ARGUMENT FOR FOUR
RESPONDENTS TO AUTHORIZING ONE OF
SAID COUNSEL TO SHARE HIS ARGUMENT
WITH A THIRD COUNSEL FOR RESPONDENTS

Pursuant to Rule 38.4 of the Rules of this Court, counsel for the four respondents herein requested leave to have oral argument presented by two counsel. On or about October 11, 1983, the Court granted said request. Due to circumstances occurring thereafter, counsel for three of the four respondents, namely, respondents Armando Lazaro Sanchez, Patsy Ann Stewart and Ricardo Albert Del Castillo, request modification of the Court's prior order so as to permit two counsel to present oral argument on behalf of said three respondents, and one counsel to present oral argument on behalf of respondent Leon. Said two counsel seek no additional time to present oral argument, and merely seek to divide the time allotted for argument on behalf of said three respondents between two counsel. Moreover, each of the two counsel will address issues separate and distinct from those presented by either of the two other counsel arguing for respondents, so no repetition in argument is anticipated.

The grounds for this application are that counsel for

respondent Del Castillo and counsel for respondents Sanchez and Stewart advocate conflicting views as to what should be presented to the Court in oral argument as to their respective clients. In order to ensure that all three respondents are represented effectively, each of the two counsel request an opportunity to address the Court during argument. Both counsel recognize that the Court is not inclined to permit multiple counsel to present oral argument. However, both counsel firmly believe that due to the unusual circumstances of this case, no one counsel can represent all three respondents without conflict. It is counsels' concern for the interests of their respective clients that prompts this application and asks the Court's indulgence.

The issues presented in this case are whether the Court should adopt a reasonable good faith exception to the exclusionary rule and, if so, whether and to what extent such an exception would affect the searches pertaining to each of the respondents. The Court is being urged to undertake a most unusual task; namely, to essentially assume a legislative role and engage in rule making. Because such a process offers the Court wide latitude in formulating the parameters of its pronouncement, each respondent in this case has a dual argument. First, the respondents may argue jointly against adoption of any good faith exception. But, the respondents part company in arguing why, if some form of exception is adopted, it should not affect the judgment below as it pertains to each respondent. It is particularly the latter argument which has now caused the conflict between respondents Del Castillo and Sanchez and Stewart.

In their joint brief, counsel for the three respondents have primarily addressed the concern that no good-faith exception be fashioned in cases where a search warrant is found lacking in probable cause. However, it is anticipated that discussion at

oral argument may also involve the parameters of such an exception. This discussion may well pertain to the extent to which probable cause existed for each of three houses and four automobiles searched. For, as Mr. Justice White noted, in cases where the warrant is so "clearly lacking a basing in probable cause" a "'good faith' defense to invocation of the exclusionary rule" cannot be supported. Illinois v. Gates, 103 S.Ct. 2317, 2345, n. 17 (White, J., concurring).

Accordingly, respondent Del Castillo represents a different interest than that of respondents Sanchez and Stewart because he seeks to challenge a different search based upon a different quantum of probable cause. For example, the warrant affidavit indicated observation of a hand-to-hand sale of narcotics involving respondents Sanchez and Stewart and police surveillance focused on homes owned or registered to said respondents; whereas, respondent Del Castillo challenges the search of his automobile where the degree of probable cause in the warrant affidavit is markedly less than that for the home searches. Accordingly, the search challenged by Del Castillo is much closer to the "egregious" case to which petitioner acknowledges no good faith exception should apply than the searches challenged by respondents Sanchez and Stewart. Furthermore, the degree of the police officer's subjective or objective good faith and the reasonableness of the magistrate's decision authorizing the warrant also differ among the three respondents according to the differing degrees of probable cause.

In addition to the conflict prompted by differing degrees of probable cause and good faith, counsel for the three respondents are in disagreement as to which arguments against adoption of a good faith exception should be presented during oral argument. Since the issue at hand pertains to a proposed rule change, it

attracted a compilation of all arguments to the contrary presented in respondents' brief. Respondents chose to consolidate their arguments in one brief in order to promote expediency and avoid redundancy. However, counsel for the respective respondents have opposing views primarily on whether those arguments pertaining to the constitutional infirmities of the good faith proposal (Respondent Br., Arguments I, II, pages 10-29) should receive elaboration at oral argument or whether the arguments pertaining to policy grounds (Respondent Br., Arguments III, IV, pages 30-67) should receive such treatment.

At the time of the filing of respondents' prior application for leave to present oral argument by two counsel, the degree of conflict between respondent Del Castillo and respondents Sanchez and Stewart was not readily apparent. It was only after preparation of the brief of respondents, consideration of arguments raised by amicus and respondent Leon, and full discussion of oral argument that the present conflict surfaced. This was due in part to the fact that the brief was written by the undersigned counsel for respondent Del Castillo and joined in by counsel for respondents Sanchez and Stewart - an event not foreseen or expected previously. Moreover, the conflict is deep-seeded as it derives from the recent realization that in exercising its rule-making function the Court may fashion an exception to the exclusionary rule that may draw a distinction, primarily along probable cause lines, between respondent Del Castillo and respondents Sanchez and Stewart. If discussion at oral argument pertains to such a distinction, one counsel representing all three respondents cannot effectively, and without conflict, present argument. Only with presentation of argument by one counsel representing respondent Del Castillo and one counsel representing respondents Sanchez and Stewart can all respondents be afforded

the benefit of effective representation.

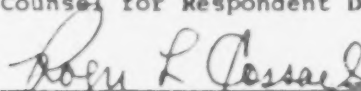
To conclude, counsel for respondent Del Castillo and counsel for respondents Sanchez and Stewart request leave to divide oral argument between them and hereby apply to the Court to modify its prior order accordingly.

November 30, 1983

Respectfully submitted,



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Counsel for Respondent Del Castillo



ROGER L. COZZACK
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Stewart

PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P.

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of eighteen years and not a party to the within action; my business address is: 6420 Wilshire Boulevard, Los Angeles, California 90048.

On December 2, 1983, I served the foregoing Application for Modification of the Court's Order Authorizing Two Counsel to Present Oral Argument For Four Respondents To Authorizing One of Said Counsel to Share His Argument With a Third Counsel for Respondents on the interested parties in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California as follows:

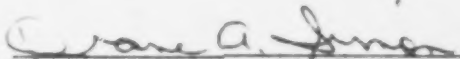
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Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

I certify under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed on December 2, 1983 at Los Angeles, California.


Diane A. Simon

No. 82-1771

Office - Supreme Court, U.S.
FILED

JAN 5 1983

ALEXANDER E. BROWN
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

ALBERTO ANTONIO LEON, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1.a. For the most part, respondents and the amici curiae supporting them counter our arguments in favor of a "reasonable mistake" exception to the exclusionary rule with dire predictions about the demise of the Fourth Amendment and the values it protects. Respondents and their amici have largely chosen to ignore the fact that continued application of the exclusionary rule in the class of cases to which a reasonable mistake exception would apply—i.e., those near the often indistinct boundary between good police work and impropriety—is as likely to deter the police from properly performing their job as it is to encourage compliance with the Fourth Amendment. Indeed, one of the most substantial group of cases to which a "reasonable mistake" exception would often apply is, we submit, cases in which the prosecution *should* have prevailed on the merits but in which lower courts *erroneously* find a Fourth Amendment

violation. See, *e.g.*, Gov't Br. 51 n.16. This Court cannot correct every such error itself, particularly in cases like the present one, in which the underlying Fourth Amendment issue is entirely fact-bound. Adoption of a reasonable mistake exception should therefore serve to return the balance where it properly belongs by eliminating the *over*-deterrence now imposed by unrelenting application of the exclusionary rule.¹ Any fair reading of our opening brief should

¹ Respondents may well be correct that the prosecution should generally prevail without benefit of a reasonable mistake exception because the strong deference accorded to magistrates' determinations of probable cause (see, *e.g.*, *Illinois v. Gates*, No. 81-430 (June 8, 1983), slip op. 21-22, 23-24) is, at least in certain types of cases, the functional equivalent of our current proposal (see Leon Br. 9; Sanchez, *et al.* Br. 33-37). Yet respondents argue that this is so only in the wake of *Gates*. They conveniently ignore the fact that *Gates's* rule of deference is not new, but instead merely reaffirms *United States v. Ventresca*, 380 U.S. 102 (1965), and *Jones v. United States*, 362 U.S. 257 (1960). The Court found in *Gates*, however, that many lower courts had not been applying the proper standard of review (*Gates*, slip op. 19 & n.9, 21), even though it had been settled for more than 20 years. It remains to be seen whether lower courts will pay greater attention to *Gates's* reaffirmation of settled law than they did to *Jones* and *Ventresca*. (The Ninth Circuit, for example, has expressed the view (totally unfounded, in our submission) that *Gates's* prohibition against de novo review of magistrates' determinations of probable cause may be limited to cases involving an informant's tip. See *United States v. Rubio*, No. 80-1577 (9th Cir. Dec. 20, 1983), slip op. 10-11.) It is worth noting, however, that there is a certain irony in respondents' vigorous opposition to a proposal they claim the Court has already effectively adopted in *Gates*.

In any event, a deferential standard of review is an incomplete substitute for the entire range of cases to which a reasonable mistake exception would apply. While the number of such cases has not, and probably cannot, be verified, their existence is undeniable. *Gates's* rule of deference does not

dispel respondents' exaggerated concerns; indeed, as we previously noted (Br. 63-64, 76-77), the common-sense modification of the exclusionary rule that we propose should serve to strengthen the substance of the Fourth Amendment.

b. Respondents and their amici nevertheless argue that our proposal is in reality a direct attack on the Warrant Clause itself, and that a reasonable mistake exception to the exclusionary rule would, in the wake of this Court's decision in *Illinois v. Gates*, No. 81-430 (June 8, 1983), represent a "double dilution" of the Fourth Amendment's probable cause standard. In the same vein, respondents and the amici supporting them argue that it is logically impossible to defend a reasonable mistake exception to the exclusionary rule because the result would be the creation of a category of "reasonably unreasonable search[es]" (see, e.g., Leon Br. 54-57). Neither argument is persuasive.

Respondents' "double dilution" argument is based on a faulty underlying premise. The first level of "dilution," according to respondents, is the definition of probable cause articulated by this Court in *Gates*. Respondents and others may well believe that *Gates* "diluted" the definition of probable cause, but the Court itself did not. Instead, the Court stated that

address, for example, the situation presented in cases like *Massachusetts v. Sheppard*, cert. granted, No. 82-963 (June 27, 1983). There, it is impossible to escape the conclusion that the search warrant was defective, no matter what the standard of review. Yet, as explained in our opening brief (at 67-68 & n.31), the defect was strictly technical and amounted to no more than harmless error. In such cases, reviewing courts should be free to consider the nature and effect of the error in determining whether the exclusionary "remedy" is appropriately invoked. (Respondents Sanchez, et al. appear to concede this point in their brief (at 35 & n.19).)

Gates's "totality of the circumstances approach is far more consistent with our *prior* treatment of probable cause than is any rigid demand that specific 'tests' be satisfied by every informant's tip." *Gates*, slip op. 15-17 (emphasis added; footnote omitted). Indeed, the Court traced its reiteration of probable cause as a "'practical, non-technical conception'" back to its 1949 decision in *Brinegar v. United States*, 338 U.S. 160, 176. *Gates*, slip op. 16. Thus, respondents' first level of "dilution" involves no dilution at all but instead represents a reaffirmation of what the Court has long understood the concept of probable cause to entail.

Respondents' second level of "dilution" stems from their perception that we are asking the Court to approve warrants issued on less than probable cause, even as defined in *Gates*. That is not the case. Quite clearly, we could not and do not ask the Court to disregard the plain language of the Warrant Clause. Instead, our proposal only recognizes the obvious: satisfaction of the standard for probable cause will usually turn on fact-bound judgments that must be made on a case-by-case basis, and there will always be cases in which reviewing courts determine that the facts fall slightly short of meeting that standard even though reasonable persons could as easily have reached the opposite conclusion. Indeed, in the category of cases to which a reasonable mistake exception would apply, there will ordinarily be room for considerable difference of opinion concerning the reasonableness of the challenged practice. Respondents' argument reduces to the proposition that in any case in which this Court divides five to four on the question of probable cause, either five or four Justices of this Court are "unreasonable" because they came to the "wrong" conclusion. Obviously, it is untenable to suggest that

in this area of the law there can be only one "reasonable" answer, notwithstanding the fact that there can be only one *final* answer.

We thus ask the Court not to alter or "dilute" the Warrant Clause, but to recognize the distinction between the wrong and the remedy—a distinction ignored by respondents in their "double dilution" and "reasonably unreasonable searches" arguments. It does not follow that a search that is "unreasonable" in the sense that five Justices of this Court have said it is must be met with a rigid remedial prescription that may be unreasonably disproportionate to the violation. Rather, having found that a particular search or seizure was in violation of the Fourth Amendment, and therefore "unreasonable" as a matter of substantive law, a court should undertake a separate inquiry into the reasonableness of applying the exclusionary rule. See page 17, *infra*. This is a distinct facet of "reasonableness" that focuses not on the substance of the Fourth Amendment, but instead on the purposes to be served by the exclusionary rule. That there is no logical inconsistency in this approach is demonstrated by the Court's decisions in cases such as *United States v. Havens*, 446 U.S. 620 (1980); *United States v. Ceccolini*, 435 U.S. 268 (1978); *United States v. Calandra*, 414 U.S. 338 (1974); and *Alderman v. United States*, 394 U.S. 165 (1969) (see the discussion at pages 34-38 of our opening brief).

2. The modification of the exclusionary rule that we propose would in no way undermine the existing incentives for police adherence to *settled* Fourth Amendment norms. Respondent Leon's argument to the contrary (Br. 37-39; see also Sanchez, *et al.* Br. 17-18 & n.7) is untenable. Leon contends (Br. 37-39) that a number of this Court's prior cases

would have been decided differently had the Court previously employed a reasonable mistake exception to the exclusionary rule *and* that those cases would now be "effectively overruled" (*id.* at 38). While the first observation may well be correct (see *Gates*, slip op. 11 n.12 (White, J., concurring)), the second is utterly without support. On the contrary, our proposal does not require this Court to overrule any of its prior precedents. The cases to which respondent Leon refers already have been decided, and, regardless of what the result in any particular case might have been had the Court employed a "reasonable mistake" approach, those decisions now represent established Fourth Amendment law. Under our proposal, the exclusionary rule would continue to apply in essentially unchanged form to evidence seized in clear violation of settled constitutional principles; thus, whatever deterrence the rule now provides would continue largely undiminished.

3. Central to respondents' argument is the contention that adoption of a reasonable mistake exception to the exclusionary rule would "freeze" Fourth Amendment jurisprudence in its present state because the courts would be thereafter disabled from adjudicating new or unsettled issues by the likelihood that a disposition of the issue in the defendant's favor would nevertheless not lead to reversal of his conviction. Jurisprudential principles rooted in Article III thus would, it is asserted, preclude the courts from deciding substantive constitutional search and seizure issues, and the exclusionary rule would no longer provide a vehicle for new constitutional adjudications to guide future behavior of law enforcement officials. This line of argument is multiply flawed.

a. There is no serious dispute that the fundamental justification for the exclusionary rule resides in its hoped-for effect of securing governmental obedience to the dictates of the Fourth Amendment as explicated by the courts. There is, however, a significant difference between that purpose and the purpose ascribed to the rule by respondents and others opposing our position, *viz.*, to create for the courts opportunities to render new constitutional adjudications. Any such justification for the exclusionary rule is surely a classic example of the tail wagging the dog. To anyone but a lawyer, and even to many lawyers, the idea that the exclusionary rule must be retained in its present form in order to perpetuate opportunities for litigation must seem absurd. Preserving a rule of evidence that is as demonstrably costly and ineffective as the exclusionary rule (in the class of cases here considered) for the purpose of assuring a continued flow of litigation is surely beyond the proper limits of the judicial function. Indeed, it is particularly ironic for respondents to support their argument that the exclusionary rule is needed to provide constitutional cases for the courts to adjudicate by reliance on this Court's cases cautioning against the unnecessary resolution of constitutional issues (Leon Br. 26 & n.40; Sanchez, *et al.* Br. 27).

b. Even if respondents and their amici were correct in their contention that adoption of a reasonable mistake exception to the exclusionary rule would deprive suppression motions of their status as vehicles for resolution of heretofore unsettled issues of substantive Fourth Amendment law (a proposition refuted in our opening brief (at 83-86 & n.52) and elaborated upon below), many of the more important and recurring issues of this nature can be resolved in

other types of judicial proceedings. See *Gates*, slip op. 20-21 & n.19 (White, J., concurring). For example, although there are no doubt limits on the circumstances in which such actions will lie (e.g., *Rizzo v. Goode*, 423 U.S. 362 (1976)), a pattern or practice of official conduct that is alleged to violate Fourth Amendment rights can often be challenged by an aggrieved individual in a suit for declaratory and injunctive relief. The warrant/subpoena issue decided by the Court in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), is one example of such litigation. The "border search" practice condemned in *Torres v. Puerto Rico*, 442 U.S. 465 (1979), is another issue that unquestionably could have been resolved as well in an action for declaratory relief by a regular traveler to Puerto Rico who was subjected to such searches upon arrival. The same is true of the checkpoint stop issue resolved in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the validity of suspicionless boat stops for document inspections in inland waters upheld in *United States v. Villamonte-Marquez*, No. 81-1350 (June 17, 1983), and the constitutionality of INS factory inspection procedures, now before the Court in *INS v. Delgado*, cert. granted, No. 82-1271 (Apr. 25, 1983).

It is true that not every arguably unconstitutional practice will be amenable to review in a suit for declaratory or injunctive relief, for such suits require a proper plaintiff. See *City of Los Angeles v. Lyons*, No. 81-1064 (Apr. 20, 1983). But even if no individual may be sufficiently exposed to risk of future injury to bring an action for declaratory or injunctive relief, damages actions against municipalities under 42 U.S.C. (Supp. V) 1983 also afford an avenue for substantive judicial review of the validity of many questionable police practices. Although a municipality

is not liable under Section 1983 on a theory of *respondeat superior*, local governing bodies are subject to suit for constitutional torts resulting from implementation of local ordinances, regulations, policies, or even customary practices. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). And by virtue of the holding in *Owen v. City of Independence*, 445 U.S. 622 (1980), such entities enjoy no good faith defense that might (under respondents' theory) impede resolution of the substantive constitutional issue. Consequently, for example, the validity of the policy of a local police force to make random, suspicionless stops of automobiles to enforce motor vehicle licensing and registration laws, decided by this Court in *Delaware v. Prouse*, 440 U.S. 648 (1979), could as well have been decided in a damages action by a motorist who had been unlawfully stopped (without even the cost of letting a single guilty offender go free).² Similarly, the validity of police automobile inventory practices, passed upon in *South Dakota v. Opperman*, 428 U.S. 364 (1976), could instead have been adjudicated in a civil action. The validity of the "chokehold" practice challenged in *City of Los Angeles v. Lyons*, *supra*, likewise could be resolved in an action for damages (see *Lyons*, slip op. 9), as could the statutorily-authorized suspicionless "pat-downs" invalidated in *Ybarra v. Illinois*, 444 U.S. 85 (1979).

Finally, it may be predicted with some assurance that even if this Court modifies the exclusionary rule as we have proposed, a number of state courts will decline to follow its lead as a matter of state law and

² Respondent Leon seems to argue (Br. 66) that the "cost of one marijuana conviction" is a small price to pay for the benefit of the decision in *Prouse*. As we have shown above, however, even that cost need not have been incurred.

will continue to suppress evidence in state trials for any Fourth Amendment violation. This Court should therefore still have available a sufficient supply of state criminal cases in which to resolve important, unsettled questions of Fourth Amendment law.

Perhaps the various avenues for substantive constitutional adjudication discussed above would not provide as fast and furious a supply of Fourth Amendment issues as does the present form of the exclusionary rule, but there is no basis for concluding that important, recurrent issues need go too long unresolved even if modification of the exclusionary rule were to diminish substantially the number of criminal cases in which resolution of such issues is essential. Accordingly, there need be no fear that Fourth Amendment law will become "frozen" in its current state.³

c. In any event, as noted in our opening brief (at 83-86 & n.52), there is no jurisdictional bar to a court's deciding a question of Fourth Amendment law even if the outcome of the case may in the end be controlled by application of a reasonable mistake exception to the exclusionary rule. Respondents' reliance

³ If respondents and their amici are correct in their assertion that a reasonable mistake exception to the exclusionary rule would "freeze" the development of Fourth Amendment law, then it logically follows that the Court unwittingly "froze" the development of other constitutional rights when in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), it approved a good-faith defense for Executive Branch officials sued for damages that is essentially the same as what we propose here. We doubt that the Court thought it was doing any such thing or, if it was, that the outcome of the case should have turned on the effect the decision would have on opportunities for future litigation.

on Article III is misplaced.⁴ At bottom, respondents' argument is that courts are constitutionally required to limit their opinions to the bare minimum necessary to make a dispositive judgment of the particular case. This position reads far more into Article III than this Court has ever suggested. Nothing in Article III prevents a court from analyzing the issues presented by a suppression motion in whatever order it deems most appropriate (see the discussion at pages 85-86 of our opening brief).

Conceptually, the situation here is no different from countless other situations in which a claimant must clear more than one hurdle before establishing his entitlement to relief. For example, nothing in Article III requires a court to decide a plaintiff's entitlement to damages before it decides the question of liability, even though a holding that the plaintiff is entitled to no damages would render decision of the liability issue unnecessary. Logically, a court would almost always determine liability before it considers relief, and the situation here would be no different. Respondents also ignore the possibility that the Fourth Amendment issue is potentially dispositive of the entire controversy if it is resolved in the prosecution's favor (making it unnecessary to consider the applicability of a reasonable mistake exception). Instead, they apparently would require a court to organize its consideration of a case backwards, looking always to find any affirmative defense that might de-

⁴ Respondents offer no explanation for the numerous cases noted in our opening brief (at 85 n.51) in which courts decide the merits of Fourth Amendment claims before deciding that the error, if any, was harmless. Yet respondents' position would require the conclusion that all of those rulings were beyond the power of the courts to make.

feat relief before examining the substance of the claim.⁵

This Court has never suggested that such a practice is required. Indeed, in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the Court followed precisely the procedure that, according to respondents, would violate Article III. In that case, the Court first held that respondent had been unconstitutionally deprived of his right to liberty through confinement in a mental institution (422 U.S. at 573-576). The Court then remanded the case for the court of appeals to consider petitioner's claim of a good-faith immunity defense in light of the intervening decision in *Wood v. Strickland*, 420 U.S. 308 (1975). Had the Court accepted respondents' view of Article III, it necessarily would have remanded the case without deciding the Fifth Amendment claim.

Respondents' error lies in confusing the case or controversy requirement of Article III with the *judicial* policy of this Court to avoid unnecessary constitutional decisions. That long-established policy is beyond reproach, and we do not suggest that the Court depart from it as a general rule. But neither should the Court turn a prudential guideline into rigid constitutional doctrine (cf. *Hagans v. Lavine*, 415 U.S. 528, 546 (1974) ("[t]he doctrine is not ironclad * * *")). When sound reasons exist for de-

⁵ In the civil context, "'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982); *Gomez v. Toledo*, 446 U.S. 635 (1980). If the same analytic framework were to apply in the context of a reasonable mistake exception to the exclusionary rule, a court surely would be free to consider the defendant's claim of a Fourth Amendment violation before taking up the prosecution's assertion of an affirmative defense.

parting from the general policy, Article III imposes no barrier against doing so. Thus, although courts clearly are not compelled to decide constitutional questions that may not dispose of a case, there is no error in doing so, especially when the "questions are otherwise properly before [the court] and may be resolved without imposing * * * additional litigative burdens." *Davis v. Passman*, 442 U.S. 228, 236 n.11 (1979).

Cases raising novel or unresolved but important and recurrent search and seizure questions might well present appropriate situations for the courts to depart from their normal practice, because the prudential reasons for avoiding unnecessary constitutional decisions would be outweighed by a perceived need to provide law enforcement officers with guidance concerning lawful conduct. The constitutional ruling in such cases would not be a prohibited advisory opinion because, as noted in our opening brief (at 85), it is clear that the defendant would be presenting a live controversy concerning the requirements of the Fourth Amendment. The end result simply would be that, notwithstanding the constitutional violation, the defendant would not be entitled to the remedy of suppression.*

* Even assuming *arguendo* some merit to respondents' position on this issue, the most it would support would be a small exception to the modification of the exclusionary rule that we propose. Most of the cases in which it would be appropriate to apply a reasonable mistake exception will involve *sui generis* factual situations that either are or are not compatible with existing law. Whether or not courts would retain the power to decide such cases is relatively unimportant, because the decisions would be of little importance in guiding future conduct in anything but precisely the same factual situation. Cases raising pure issues of Fourth Amendment law never before addressed are relatively rare, however, and it is only those cases to which respondents' argument has any relevance.

4. Respondents argue (Sanchez, *et al.* Br. 28-29) that a reasonable mistake exception will halt the development of "bright-line" rules to guide police conduct. We have just shown that respondents' fear that Fourth Amendment adjudications will cease is unfounded. But even assuming the correctness of respondents' underlying premise, it is clear that bright-line rules cannot possibly be devised for every Fourth Amendment situation confronting law enforcement officials in the performance of their duties. As one commentator has observed (Ashdown, *Good Faith, The Exclusionary Remedy, and Rule-Oriented Adjudication in the Criminal Process*, 24 Wm. & Mary L. Rev. 335, 365 (1983)):

The problem * * * is an inherent inability to achieve an adequate level of irradiation for the police to consistently follow and for the courts to effectively utilize. Fourth Amendment encounters between the police and the public are simply too numerous and too varied to be subject to standardized procedures that will always dictate the appropriate police response. Because of this variety and diversity, attempts to draft bright-line rules have proved unsuccessful. Such rules provide some guidance but are incapable of addressing in advance all the factual situations that police may encounter.

The instant case offers a clear example of the impossibility of devising bright-line rules for every situation. Respondents have not even attempted to articulate any rule that would have told Officer Rombach what additional information he should have obtained before applying for a warrant in this case (assuming, *arguendo*, that the lower courts correctly held that he had not already obtained sufficient information to es-

tablish probable cause). Thus, it is in fact-bound disputes such as the present one that the courts are least able to guide officers in the daily performance of their duties. As the Court observed in *Gates*, slip op. 23 n.11, "[t]here are so many variables in the probable cause equation that one determination will seldom be a useful 'precedent' for another." See also slip op. 17. Moreover, it is in these same cases that the risk of *erroneous* suppression rulings is at its greatest, because it is inevitable that reasonable persons will differ as to the sufficiency of a given quantum of information when the question is a close one. Thus, however desirable the development of bright-line rules may be, such rules provide no solution to cases such as this.

5. Respondents contend (Leon Br. 57-58; Sanchez, *et al.* Br. 11-16) that the exclusionary rule is a constitutionally required remedy for Fourth Amendment violations. Respondents Sanchez, *et al.* argue (Br. 11-14) that the exclusionary rule is required by the Fifth Amendment as well, relying on this Court's decision in *Boyd v. United States*, 116 U.S. 616 (1886), and Justice Black's concurring opinion in *Mapp v. Ohio*, 367 U.S. 643, 662 (1961) (Black J., concurring). Neither argument is correct.

a. Respondents' Fifth Amendment argument completely overlooks this Court's decision in *Andresen v. Maryland*, 427 U.S. 463 (1976). There, the Court squarely rejected the notion that the broad language in *Boyd* and subsequent cases discussing the relationship between the Fourth and Fifth Amendments compelled suppression of petitioner's business records (427 U.S. at 472). The Court explained (*id.* at 473-474) that:

This case thus falls within the principle stated by Mr. Justice Holmes: "A party is privileged from producing the evidence but not from its production." *Johnson v. United States*, 228 U.S. 457, 458 (1913). This principle recognizes that the protection afforded by the Self-Incrimination Clause of the Fifth Amendment "adheres basically to the person, not to information that may incriminate him." *Couch v. United States*, 409 U.S., at 328. Thus, although the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information, see *Fisher v. United States*, *supra*, a seizure of the same materials by law enforcement officers differs in a crucial respect—the individual against whom the search is directed is not required to aid in the discovery, production, or authentication of incriminating evidence.

Here, too, because respondents were "not compelled to testify in any manner" (*Andresen*, 427 U.S. at 477), the Fifth Amendment privilege against self-incrimination is simply not implicated. See also Wilson, *The Origin and Development of the Federal Rule of Exclusion*, 18 Wake Forest Law Rev. 1073, 1096-1101 (1982).

b. Respondents' argument that the exclusionary rule is required by the Fourth Amendment fares no better. As we noted in our opening brief (at 31), the Court has never held that the rule is constitutionally required. Respondents' argument to the contrary depends on the "personal right" theory (see Leon Br. 57-58)—a doctrine long ago repudiated by this Court. See, e.g., *United States v. Calandra*, 414 U.S. 338, 348 (1974) (exclusionary rule not "a personal constitutional right of the party ag-

grieved"). Respondents and their amici dismiss *Callandra* and other cases rejecting the personal right theory on the basis that those cases involved the "collateral" use of illegally obtained evidence, rather than the use of such evidence as part of the government's case-in-chief against a defendant who has himself been the victim of an unlawful search or seizure.⁷ Only last Term, however, the Court reiterated its rejection of the personal right theory (*Gates*, slip op. 8) without in any way suggesting that the rejection was limited to "collateral" uses of illegally obtained evidence. Instead, the Court observed, in words of general applicability, that "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Ibid.* The Court made the same point in *United States v. Janis*, 428 U.S. 433, 443 (1976) (footnote omitted):

[The] comparatively late judicial creation of a Fourth Amendment exclusionary rule is not particularly surprising. In contrast to the Fifth Amendment's direct command against the admission of compelled testimony, the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation.

⁷ Respondents fail to account for *United States v. Janis*, 428 U.S. 433 (1976), in which the Court sanctioned the use in a federal civil tax proceeding of evidence obtained in violation of the Fourth Amendment by local law enforcement officials. The Court's analysis of the case in terms of the amount of deterrence to be obtained versus the costs of suppression would not be supportable under the "personal right" doctrine because there was no question that Janis's "personal rights" had been violated by the unlawful state search.

See also *Scott v. United States*, 436 U.S. 128, 135-137 (1978); Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. Tex. L.J. 531, 542-557 (1982).

In our view, therefore, the nature of the proceeding, though relevant, is not a controlling inquiry; rather, the question is whether the "remedial objectives * * * [of the exclusionary rule will be] efficaciously served." *Calandra*, 414 U.S. at 348. While it may be conceded, for purposes of argument, that those objectives are most likely to be served in the context of the main criminal trial itself, nevertheless, as we demonstrated in our opening brief, they are not *sufficiently* served in situations in which the police cannot reasonably be expected to have known that their conduct would later be declared unlawful. Assuming, arguendo, that the Constitution contemplates a remedy for Fourth Amendment violations, respondents have nevertheless failed to provide any support for the proposition that the Constitution requires an *ineffective* remedy. The Court's decisions limiting the suppression remedy to those cases in which it can be expected to achieve its intended result are thus fully consistent with the Constitution, as is our proposal for a reasonable mistake modification to the exclusionary rule.

6. Citing various empirical studies, respondents contend that the exclusionary rule actually frees very few criminal defendants (*Sanchez, et al.* Br. 60-64; *Leon* Br. 43-53).^s In the final analysis, however, the

^s Judge Wilkey has offered one explanation for this phenomenon (*Wilkey, supra*, at 536-537):

[T]he percentage of prosecutions lost because of the exclusionary rule * * * will remain about the same, no matter what the law is. This is true because any intelligent

conflicting empirical data would seem to be of little benefit to the Court; it is more probable, as Justice White noted in his concurrence in *Gates* (slip op. 12), that "[w]e will never know how many guilty defendants go free as a result of the rule's operation." But this Court's own experience would seem to belie respondents' minimization of the impact of the exclusionary rule. As we noted in our opening brief (at 51 n.16), last Term alone this Court reversed seven lower court decisions that had invalidated searches or seizures on Fourth Amendment grounds. If that many cases are affected at the apex of the criminal

prosecutor's office will immediately adjust itself to the most recent decision on the exclusionary rule or any other principle of law affecting the chance of conviction or acquittal in future cases. No matter whether the latest case increases or decreases the likelihood of suppression of evidence, the prosecutor will adjust his decisions about which accused criminals to prosecute on the basis of the law which is now actually in effect.

In other words, the prosecutor will always bring all of the cases which he is confident of winning, and a number of cases which are on the borderline * * *. But * * * the prosecutor will change his assessment of the probably winnable and the improbably winnable as the shifting tides of jurisprudence from the higher courts inform him of where the law is. Hence, the percentage of prosecutions won and lost will remain about the same in every intelligent, up-to-date prosecutor's office, no matter what the law is or how the rules change.

Another explanation is that the world respondents depict appears to be one in which very few Fourth Amendment violations occur or, if they do, they are visited primarily upon innocent persons who never have the opportunity to invoke the exclusionary rule. In either event, if the rule actually has as little practical effect as respondents contend, it is difficult to grasp the justification for maintaining it in cases such as the present one.

justice pyramid, it simply is not credible to assume that the rule's impact in the lower courts is insignificant.

Assuming for the sake of argument, however, that respondents are correct in their assessment of the rule's impact, their vigorous opposition to our proposal can be explained only by a desire to retain the windfall benefits of the rule for the few guilty defendants who are fortunate enough to invoke it successfully. We have previously shown that the rule would remain unchanged in the case of clear violations of the Fourth Amendment, and respondents have utterly failed to demonstrate how the rule's deterrent purposes can be achieved when it is applied to conduct that the police could not reasonably be expected to have known was illegal. Thus, retention of the rule in the class of cases here under consideration is costly no matter how few guilty defendants escape conviction because no countervailing benefits are obtained for the criminal justice system; on the contrary, the system is severely taxed by having to devote significant amounts of time and resources to Fourth Amendment issues of only marginal significance (see Gov't Br. 74-75).

7. Respondents' apocalyptic prediction that creation of a reasonable mistake exception to the exclusionary rule would result in the wholesale abdication by magistrates of their duty to make a reasoned decision on every application for a search warrant is riddled with contradictions. On the one hand, respondent Leon argues, in effect, that most magistrates are already so incompetent that they cannot be trusted to perform their job (Br. 10-13). On the other hand, he argues (Br. 13-16) that they can be controlled through judicial review, which he erroneously assumes

would cease if the Court were to adopt a reasonable mistake exception. But if magistrates are already failing to perform their job, the logical conclusion to be drawn is that they are simply unresponsive to the suppression sanction, and its continued application to them therefore serves no purpose. Similarly, respondent Leon argues (Br. 18) that virtually all magistrates are "rubber stamps" under the current system, and at the same time contends (Br. 22) that a reasonable mistake exception would encourage "magistrate shopping." If respondent Leon's view of the current system is at all accurate, there would be no need for the police to resort to "magistrate shopping" in the future.

In our submission, respondents' dismal picture of magistrates' current performance is greatly exaggerated,⁹ but, in any event, respondents have offered no reason to believe that a reasonable mistake exception would create any new incentive for magistrates to be lax or remiss in their duties. Moreover, respondents ignore the fact that magistrates have no partisan stake in the outcome of a prosecution (see Gov't Br. 58-60). To the extent that magistrates are trained professionals (*e.g.*, lawyers or judges), they may be expected to respond to the judicial guidance supplied by appellate review which, as we have shown, would continue to be available in appropriate cases. Maintaining the additional sanction of suppression, how-

⁹ Although respondents paint a picture of magistrates across the nation issuing vast numbers of wholly unjustified warrants, they fail to cite any substantial body of case law for their assumptions, and we doubt that the cases would bear them out. In any event, warrants so totally lacking any basis for issuance would not fall within the scope of a reasonable mistake exception to the exclusionary rule (see Gov't Br. 65-66 & n.28).

ever, is simply overkill; it cannot "deter" those who have no stake in being deterred. Non-lawyer magistrates, on the other hand, are even less likely to be influenced by the exclusionary rule. Not only do they lack any stake in the prosecution, but they also lack the professional background necessary to make them responsive to appellate oversight. Granting, then, that the use of non-lawyer magistrates may well be a matter of concern for the criminal justice system, the fact remains that suppression is an inappropriate response to the problem.¹⁰ It cannot be shown to serve the purpose of improving magistrates' performance, while at the same time it penalizes the police for mistakes they did not make. In short, the problem of poor performance by some magistrates will not be solved by continued application of the exclusionary rule to the type of case under consideration here.

8. We clearly stated in our opening brief (at 78-81) that the reasonable mistake exception should be grounded in objective reasonableness and that the

¹⁰ As Justice White noted in his concurrence in *Gates* (slip op. 18 n.17), this Court's holding in *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), was quite narrow. Although the Court upheld the issuance by non-lawyers of arrest warrants for breaches of municipal ordinances, it did not hold, in *Shadwick* or in any other case, that any person taken off the street can issue any type of warrant. Rather, "an issuing magistrate must * * * be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search" (*Shadwick*, 407 U.S. at 350 (emphasis added)). Thus, the solution to problems of the type encountered in *State v. Upchurch*, 267 N.C. 417, 148 S.E.2d 259 (1966) (see *Leon Br. 11 & n.10*), lies not in the exclusionary rule as applied on a case-by-case basis, but rather in disqualification of "magistrates" who do not meet *Shadwick's* dual requirements. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

subjective intent of the searching officer would be irrelevant (except, perhaps, in those rare cases in which a warrant was procured in bad faith or on the basis of material misrepresentations (see *Franks v. Delaware*, 438 U.S. 154 (1978))). Nevertheless, respondents persist in the argument that our proposal would necessarily entail a subjective component as well, apparently for the dual purpose of enabling them to present the Court with the spectre of unwieldy judicial proceedings and repetition of the canard that our proposal would "place a premium on police ignorance." Neither proposition has merit.

Respondents themselves acknowledge that a subjective inquiry would be both awkward and unproductive. See *Sanchez, et al.* Br. 46. It is precisely for these reasons that we would eschew the subjective inquiry altogether. The objective assessment that we propose would be conducted in much the same manner as substantive Fourth Amendment questions are now decided and would be no more difficult than what is required in good-faith immunity cases under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Asking an officer "to explain why he acted unconstitutionally" (*Sanchez, et al.* Br. 46) would be neither necessary nor appropriate. Rather, the determination of objective reasonableness would be essentially a question of law, in which a court need determine only whether an officer's conduct departed unduly from established Fourth Amendment principles.¹¹

¹¹ Respondents criticize us for failing to define the "reasonably well-trained officer" with absolute precision (*Leon* Br. 33-34; *Sanchez, et al.* Br. 46 n.34). We continue to believe that a complete definition can best be developed through initial consideration by lower courts. But that is not to say that the question is as murky as respondents would have the

The contention that a reasonable mistake exception would put a premium on police ignorance is a straw-man; by definition, a reasonably well-trained officer must have more than a passing acquaintance with Fourth Amendment law. For the same reason, there would be no incentive for police departments to abandon training programs, or for individual officers deliberately to engage in searches of dubious legality, because to do so would deprive them of the benefits of an objective reasonable mistake exception. So too, the incentives for internal review of warrant applications would continue unchanged. On the federal level, FBI and DEA agents are *required* to obtain the approval of an Assistant United States Attorney before applying for a search warrant,¹² and that policy would not be abandoned if a reasonable mistake exception were adopted. Indeed, any law enforcement officer or department that sanctioned a shift from "‘what does the fourth amendment require?’ to ‘what will the courts allow me to get away with?’" (Stewart, *The*

Court believe. For example, the reasonably well-trained officer would be expected to know the governing law in the jurisdiction in which a particular case is tried. In this case, therefore, Officer Rombach should be held to a standard of knowledge that encompasses the relevant decisions of this Court and the Ninth Circuit. It would not matter whether the officer was an FBI agent, a city police officer, or a rural deputy sheriff; regardless of the officer's particular background, he would have to meet the standards of the court in which the evidence is sought to be admitted.

¹² See, e.g., FBI, U.S. Dep't of Justice, *Legal Handbook for Special Agents* §§ 2-6, 2-7.1, 2-7.2 (Aug. 27, 1982). While the practice among the states undoubtedly varies, it is our experience that law enforcement officers generally consult with prosecutors prior to applying for search warrants. In this case, for example, Officer Rombach consulted with three deputy district attorneys (Pet. App. 14a).

Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Colum. L. Rev. 1365, 1403 (1983) (footnote omitted)) would simply be increasing the likelihood of suppression. Assuming the validity of the deterrence rationale by which the exclusionary rule is justified, there is thus no basis for supposing that a reasonable mistake exception would encourage Fourth Amendment violations.

In short, it is beyond dispute that police training in the requirements of the Fourth Amendment has improved markedly since *Weeks* and *Mapp* were decided. But even the best-designed training programs can do no more than educate officers as to the extant principles of law. Hypothetical answers to unsettled questions as to which reasonable judges could differ cannot realistically serve as a guide for police conduct. Once the questions have been answered, however, the reasonable mistake exception we propose will increase the incentives for police departments to disseminate new legal rulings as rapidly as possible. Far from placing a premium on ignorance, an exception that is keyed to the reasonably well-trained police officer places a premium on reasonableness and on training.

9. Respondents Sanchez, *et al.* argue (Br. 48-50) that any modification of the exclusionary rule should be left to Congress. While legislative action would indeed be an appropriate and welcome response to the increasingly widespread recognition that the rule requires modification, this Court need not wait for Congress to act. More than a decade ago, the Chief Justice urged congressional action (*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 421 (1971) (Burger, C.J., dis-

sending)), but to date Congress has not responded. The speculative possibility that legislation might someday be enacted should not deter the Court from resolving the important question presented by this case, particularly when the issue is the proper application of a rule created by this Court itself.

10. Finally, respondent Leon argues (Br. 70-73) that any reasonable mistake modification adopted by this Court should not apply to him because "no reasonable California police officer could conclude, under the prevailing articulated legal standards, that probable cause to search Mr. Leon's house had been made out" (*id.* at 70 (footnote omitted)). Notably, the other respondents make no comparable arguments. Respondent Leon is able to make the argument only by reliance on a rigid reading of the now-discarded *Aguilar-Spinelli* test;¹³ his argument that no reasonable officer could have concluded that the "totality of the circumstances" established probable cause flies in the face of common-sense experience in narcotics cases. As Judge Kennedy observed in dissent, the officers' month-long investigation in this case revealed a pattern of conduct that "was inconsistent with any explanation other than illegal drug activity" (Pet. App. 5a).¹⁴

¹³ Respondent Leon also bases his argument on California law (Br. 73 nn.140 & 141). As previously noted (see pages 23-24 note 11, *supra*), California law is irrelevant to what should be expected of a reasonably well-trained police officer in a federal prosecution.

¹⁴ Because the application of a reasonable mistake exception was not adjudicated below, the most that can be made of respondent Leon's argument is a remand for initial determination by the courts below. We would have no objection to such a proceeding if the Court deems it necessary.

For the foregoing reasons, as well as those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

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CLERK

No. 82-177

IN THE
Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,
Petitioner,

v.

ALBERTO ANTONIO LEON et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF THE
Arkansas Trial Lawyers Association,
Alabama Criminal Defense Lawyers Association,
North Carolina Academy of Trial Lawyers, and
Tennessee Association of Criminal Defense Lawyers

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INTEREST OF THE AMICI CURIAE

The four amici curiae joining in this brief are the Arkansas Trial Lawyers Association, the Alabama Criminal Defense Lawyers Association, the North Carolina Academy of Trial Lawyers, and the Tennessee Association of Criminal Defense Lawyers. The amici have obtained letters of consent from both sides in this case to file this brief, and the letters are being filed with this brief.

The amici are voluntary associations of trial lawyers in their states. These four groups of trial lawyers each are organized to promote the proper administration of justice and to defend the principles of the United States Constitution. The amici believe that a good faith exception to the Fourth Amendment exclusionary rule, even if acceptable in principle, has its limits, and this case presents a situation where the good faith exception should not be extended.

The amici believe that the Fourth Amendment exclusionary rule is a scapegoat for unfounded claims that it seriously contributes to the crime rate when, in reality, the Fourth Amendment

exclusionary rule is actually invoked in only about 1% of all criminal cases. The government's argument in favor of the good faith exception in this case is simplistic and ignores the realities of the warrant process in America. More fundamentally, however, the government seeks to subvert a core value of the Fourth Amendment: the need for probable cause.

The ramifications of the government's argument go far beyond its expressed purpose of criminal accountability, as laudable as that is. The government's good faith exception will further promote Fourth Amendment violations, and all citizens will be subject to such violations without the government being properly accountable. This issue involves the rights of all Americans, not just the so-called "criminal element" whose cases usually adjudicate Fourth Amendment rights.

For these reasons, amici stand foresquare against the government's effort to undermine the Fourth Amendment by seeking to extend the good faith exception in this case.

A R G U M E N T

THE GOVERNMENT'S PROPOSED GOOD FAITH EXCEPTION TO THE PROBABLE CAUSE REQUIREMENT IS UNCONSTITUTIONAL AND SHOULD BE REJECTED.

A. Introduction.

The Fourth Amendment is clear and unremitting in its requirement that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This case involves an issue that cuts to the heart of the Fourth Amendment: whether the core value of the probable cause requirement is subject to the good faith exception the government seeks to have the Court adopt.

Amici submit that the government has framed the question presented for review erroneously. To show the issue in its starkest terms, amici submit the issue should read:

Whether the Fourth Amendment exclusionary rule should be modified to permit

searches under a search warrant erroneously issued at the request of the officers but without probable cause where the officers reasonably relied on the invalid warrant they procured.

This is the issue actually presented for review under the facts of this case. The government's argument is a full scale attack on the exclusionary rule which obscures the fact the government actually is requesting the Court sanction searches without probable cause but with only a good faith belief that probable cause exists.

In considering the government's argument in this case, it is appropriate to start from Justice Frankfurter's admonition in United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting):

It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in Boyd v. United States . . . , in Weeks v. United States . . . , in Silverthorne Lumber Co. v. United States . . . , in Gouled v. United States . . . , or one approaches it as a provision dealing with a formality. It makes all the difference in the world whether

one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.

- B. The officers' failure to recognize they lacked probable cause for the search warrant they procured cannot legitimize the search conducted under the warrant when it is later determined that they lacked probable cause for the issuance of the warrant. The officers are not blameless on the failure of probable cause.

The government initially argues that the cost-benefit analysis of deterrence should be the basis for applying the exclusionary rule. Then, the government subsumes this premise as a part of its argument that the officers here could not be deterred from a Fourth Amendment violation where they conducted a lengthy [albeit incomplete] investigation, they detailed the facts and circumstances which they believed showed probable cause, they consulted with assistant district attorneys on whether there was probable cause, and they presented their affidavit to a state superior court judge who issued the search

warrant. The government argues "that no credible justification has ever been advanced for invoking the exclusionary rule when, as in Leon and Sheppard, the police have not engaged in any misconduct whatsoever, but a judicial officer has issued a search warrant that is subsequently held to be defective." (Govt's Brief at 57)

The efforts of the officers here are to be commended to some degree; they did everything they could to assure themselves that they were acting properly, but their pre-warrant investigation did not go far enough. The magistrate issued the warrant at their request. The fatal problem is that they acted too soon before the investigation was complete and there was no probable cause for the search they wanted to undertake. Here, the government shifts all the constitutional blame to the magistrate. The fallacy of this contention is exposed by considering the role of the magistrate in the issuance of search warrants.

Magistrates do not operate in a vacuum; nor do they collect and evaluate probable cause for issuance of a warrant on their own directed to a disinterested police officer to serve. Magistrates

are required to be "neutral and detached" under the Fourth Amendment. See, e.g., Johnson v. United States, 333 U.S. 10, 13 (1932); Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971); United States v. United States District Court, 407 U.S. 297, 316 (1972). The police "officer engaged in the often competitive enterprise of ferreting out crime"; Johnson, supra, at 13; investigates and collects his evidence. When he thinks he has probable cause, he may present that evidence to a magistrate for evaluation and issuance of a search warrant if one is desired. The timing of the issuance of the warrant is important--if the officer gets a warrant prematurely before probable cause is developed, the entire case may be compromised. (Note the analogy to premature indictment and the speedy trial requirements compromising a criminal case which should not have yet been filed.) When the officer presents his information to the magistrate, the judicial process is finally invoked. The magistrate reviews the facts and circumstances submitted and decides whether or not the requested warrant should issue.

Some of the realities of the warrant process should be noted at this juncture: First, the officer usually prepares his own affidavit and warrant which he then takes to the judicial officer. Sometimes, a prosecutor will be asked to assist in preparation of the affidavit and warrant in more complicated cases. Then, the magistrate reads the affidavit to evaluate probable cause. Where local law permits it, the affidavit may be supplemented by testimony if needed. Usually, but without asking a question, however, the magistrate signs the warrant prepared by the officer, and the search is underway. Quite seldom, if ever, do individual magistrates actually turn down a search warrant request. A conscientious, well-trained, and independent federal magistrate may actually do that on occasion, but amici submit that the number of search warrant requests actually turned down by state and federal magistrates is far less than 1% of all presentations made. The fact magistrates usually defer to the police in practice is evident in the fact that warrants are often struck down after the fact for lack of probable cause by suppression judges, just as in this case.

C. "Two wrongs do not make a right."

It is thus an intellectual fallacy to argue as the government does that the magistrate was the only one who erred in issuing the warrant, which the government now admits was defective because probable cause was lacking after losing on that issue in the district court and the Ninth Circuit, and that the police are totally blameless in this investigatory adventure. The police here collected the facts and circumstances for quite some time, but they erroneously believed that they had probable cause. Being somewhat unsure of their probable cause, they asked some assistant district attorneys, advocates who are also intimately involved "in the often competitive enterprise of ferreting out crime," for assistance, and the the prosecutors also erred in the assessment of probable cause. The magistrate merely acted on the search warrant application and issued the warrant.

The government in essence is arguing here that the act of the magistrate is determinative on the question of probable cause. It argues that if the magistrate errs on the assessment of

probable cause, all the government need show is that the officers acted in good faith on the warrant which they presented which lacked probable cause. Thus, the government really argues that "two wrongs make a right," and the magistrate's same error mystically cures their error and allows a search without probable cause to go forward and the proceeds into evidence in a criminal trial. (Govt's brief at 58-61)

Then, there would no longer be any need for a suppression hearing because good faith was established by the magistrate, and judicial review is foreclosed.

D. There can be no "good faith exception to the probable cause requirement" under the Fourth Amendment.

What the government seeks in this case is not merely a "good faith exception" to the exclusionary rule or the Court's refusal to extend the exclusionary rule to this type of conduct. What the government seeks transcends the issues it argues and amounts to a request that the Court adopt a "good faith exception to the probable cause requirement."

This is a dangerous concept which must be flatly rejected by this Court. This is no small encroachment on a protected liberty--it would cut the heart out of the probable cause requirement of the Fourth Amendment.

The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, supra, 407 U.S. at 313; Payton v. New York, 445 U.S. 573, 585 (1980). A search of a dwelling must be based upon probable cause and a warrant or bona fide exigent circumstances to dispense with a warrant. Id. (Here, there is no issue of exigent circumstances.)

An entry which is based on a fundamental error of law as to the existence of probable cause, no matter what the good faith of the officer and magistrate, is nonetheless a violation of the Fourth Amendment. A good faith mistake as to the facts which yields probable cause is one thing; a good faith mistake as to whether the known facts add up to probable cause is quite another. If the issue in suppression hearings becomes not whether the officer actually

had probable cause but whether he could objectively rely on a magistrate's erroneous determination of probable cause made at his own request, there no longer will be any need to evaluate probable cause after the fact in any case. Today's ultimate search and seizure question, the question of probable cause, will be replaced by an inquiry into whether the officer could objectively believe he had probable cause. The Fourth Amendment will atrophy as a constitutional protection because the existence of probable cause would be purely an academic question which would no longer need resolution on any given set of facts.

This Court has, on recent occasion, sought to implement "bright line" rules for officers to follow. See, e.g., New York v. Belton, 453 U.S. 454 (1981); United States v. Ross, 456 U.S. 798 (1982). The government's proposed good faith exception would end any need to rely on specific rules. Instead, nebulous and undefinable concepts of "reasonableness" and "good faith" would take their place. Without any need to follow rules, no officer would not be acting in "good faith" in the future, and the "good faith

exception" would be a self-fulfilling prophecy in every case from now on. Then, it would no longer be an exception--it would be the rule.

E. This proposed good faith exception will promote police disrespect for the core values of the Fourth Amendment.

This broad proposed good faith exception to the probable cause requirement will promote further police disrespect for the core values of the Fourth Amendment.

The courts are the only institution to protect us from police abuse of Fourth Amendment rights. Since the "judicial integrity" rationale for evidentiary exclusion lost its viability, the police read any judicial use of illegally seized evidence as condoning the illegality which brought it before the bar. See LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith", 43 U. Pitt. L. Rev. 307, 354-59 (1982). What is the goal of "the often competitive enterprise of ferreting out crime"? Securing convictions, of course. When evidence cannot be used because it was illegally obtained, any officer remotely

attempting to do a professional job will obviously do better the next time and not act illegally unless he is corrupt or stupid. When the courts are, however, unwilling to reject illegally seized evidence because of a desire to convict the guilty and no longer balance rights, the officer will see that his illegal act has been condoned by the courts. The police will then "push to the limit" any authority they are given by the courts." Id. at 359 n. 285 quoting Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

No American right is already subject to more governmental abuse than the Fourth Amendment right to be free from unreasonable searches and seizures. The government implies here it cannot make its officers comply with the Fourth Amendment often enough, so it should no longer be accountable when they do not. In reality, the Fourth Amendment is violated in every jurisdiction every day. As a limit on governmental power, the Fourth Amendment has a vital role in our constitutional freedoms. The government's failure to follow the law cannot be an excuse to overlook the law when the question is something

as fundamental as "The right of the people to be secure . . . against unreasonable searches and seizures"

F. The government's arguments that the exclusionary rule subverts the truth-finding function and promotes disrespect for the law defy logic.

There still is such a thing as government accountability, and the government here sweeps that issue under the constitutional rug and never addresses it. Government accountability is why the Framers gave this nation a Bill of Rights--it is a final check on government power. Now the government wants this Court to take that away from us in the name of "crime control" and criminal accountability by arguing that the exclusionary rule contributes to crime and disrespect for the law even though the government must concede that the exclusionary rule is successfully invoked in only a small percentage of cases. (Govt's Brief at 70-74)

The Fourth Amendment was intended to protect all citizens, both the law-abiding and the lawless, from unjustified governmental intrusions. See, e.g., Weeks v. United States, 232

U.S. 383, 395 (1914); Agnello v. United States, 269 U.S. 20, 32 (1925); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931); United States v. Lefkowitz, 285 U.S. 452, 464 (1932); McDonald v. United States, 335 U.S. 451, 455-56 (1948); Miller v. United States, 357 U.S. 301, 314 (1958); Ker v. California, 374 U.S. 23, 33 (1963).

"It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." United States v. Rabinowitz, *supra*, at 69 (Frankfurter, J., dissenting). But, the rights at issue here are the rights of all the people--not just the respondents. The government would love to convict the respondents, but at what expense?

The government argues that the exclusionary subverts the truth-finding function of the courts. But, so does the entire law of privileges, and the "sole warrant [of a privilege] is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the

administration of justice." McCormick on Evidence § 72, at 152 (2d ed. 1972). Surely the maintenance of a constitutional freedom is worth something. Some things are more important than finding the truth in a criminal trial. A free society is one of them.

The exclusionary rule may free some guilty people, but so does the presumption of innocence and the government's burden of proof beyond a reasonable doubt. Guilt, however, is a question for juries, not appellate courts and not prosecutors. Where does Blackstone's admonition that "better a guilty man go free than an innocent man be convicted"¹ fit in to American law now?

1. Actually, Blackstone said: "[A]ll presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer." 4 Blackstone, Commentaries *352.

Also, Blackstone would have approved of the exclusionary rule had it been around in his time. See 1 Blackstone, Commentaries *244-45:

"For, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases, which the law will not, out of decency suppose: being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of

The exclusionary rule may benefit the guilty, but the Fourth Amendment benefits us all. The government's zeal to eviscerate the exclusionary rule in the name of crime control is forsaking a fundamental freedom which it will incidentally turn into a "form of words"; Mapp v. Ohio, 367 U.S. 643, 655 (1961); as the Court warned against seventy years ago in Weeks v. United States, 232 U.S. 383, 394-95 (1914):

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their of-

(note 1, cont.) that power precarious and impracticable. For, wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. For which reason all oppressions which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any stated rule, or express legal provision: but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies." (emphasis in original).

ficials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. . . . In Adams v. New York, 192 U.S. 585, this court said that the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it. Boyd Case, 116 U.S. 616. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

G. In Conclusion.

As Circuit Judge Richard Sheppard Arnold wrote in Williams v. Nix, 700 F.2d 1164, 1174 (8th Cir. 1983), cert. granted 103 S.Ct. 2427, a Sixth Amendment good faith case:

It will inevitably be remarked that our opinion focusses more on the conduct of the police than of the alleged murderer. If Williams is indeed guilty, and if he goes free as a result of our holding, then complete justice may not have been done, even though Williams has served 14 years in prison. A

system of law that not only makes certain conduct criminal, but also lays down rules for the conduct of the authorities, often becomes complex in its application to individual cases, and will from time to time produce imperfect results, especially if one's attention is confined to the particular case at bar. Some criminals do go free because of the necessity of keeping government and its servants in their place. That is one of the costs of having and enforcing a Bill of Rights. This country is built on the assumption that the cost is worth paying, and that in the long run we are all both freer and safer if the Constitution is strictly enforced.

Just how much depredation of the Fourth Amendment will this Court permit before it stops this encroachment on our cherished liberties in the name of "crime control"? This case presents a proper occasion to draw a line.

C O N C L U S I O N

The judgment of the Ninth Circuit should be affirmed and the government's proposed extension of the good faith exception should be rejected.

Respectfully submitted,

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OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

ALBERTO ANTONIO LEON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF RESPONDENTS

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No. 82-1771

In The
Supreme Court of the United States
October Term, 1983

UNITED STATES OF AMERICA,
Petitioner,

against

ALBERTO ANTONIO LEON, et al,
Respondents

On Writ of Certiorari to The United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE ON BEHALF OF
THE ASSOCIATION OF TRIAL LAWYERS
OF AMERICA
IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Association of Trial Lawyers of America, founded 38 years ago, is a voluntary National Bar Association with a membership exceeding 50,000 advocates of

whom 5,000, constituting the Criminal Law Section, regularly appear in both state and federal courts in defense of those accused of crime. The men and women of the Association, the largest trial bar in the world, are pledged to the preservation of the American legal system, the protection of individual rights and liberties, and the evolution of the common law. The Association, through its appropriate officers and committees, has authorized its participation in this case as amicus curiae. This brief is filed with the written consent of all the parties.

The Association is vitally concerned with this appeal, not only for the instant case, but also for the effect the decision in this case will have on similar cases now pending throughout the

country as well as on the development of constitutional doctrine. Convinced that the efficacy of the Fourth Amendment protections depends on the unencumbered viability of the exclusionary rule, the Association believes that this case is of critical importance to its members and their clients.

SUMMARY OF ARGUMENT

Opponents of the exclusionary rule have chosen to identify its principal if not sole purpose as the deterrence of unconstitutional behavior by law enforcement officers. Having thus characterized the rule, they then place the onus upon its defenders to demonstrate empirically

that deterrence does result. While deterrence of unconstitutional acts is frequently demonstrable, though often difficult to quantify, the debate on this issue is largely a distraction from the fundamental justification: the Fourth Amendment provides for the liberty, property and privacy of individuals, and the exclusionary rule vindicates any deprivation of those rights.

Never has it been suggested that a utilitarian analysis be employed in regard to the enforcement of other constitutional rights--for example, the exclusion of illegally obtained confessions, the right to confront one's accuser, or the effective assistance of counsel. In these and many other areas, once a constitutional deprivation was found, no reflection upon the deterrent effect of

voiding the conviction has been considered appropriate. The fact that the petitioner had been denied a constitutional right was good and sufficient reason for granting relief.

To speak in terms of balancing the rights of the individual against society's needs for law enforcement is misplaced in an analysis of the exclusionary rule. The balancing process is applicable, and in fact necessary, in defining the scope of the Fourth Amendment. When the balancing analysis is applied to the exclusionary rule an ominous result occurs: unconstitutional actions on the part of law enforcement officers are condoned. This Court has never held that practical needs could justify governmental acts that are unconstitutional.

While it is accurate to say that the

exclusionary rule is not explicit in the Fourth Amendment, this in no way distinguishes the Fourth Amendment from other provisions in the Bill of Rights. Read literally, nothing in the panoply of constitutional guarantees for those accused of crime specifies the remedy for a deprivation. The implication, however, has always been clear: a criminal conviction cannot stand if achieved at the cost of violating the constitution. Illegally obtained confessions may not be admitted into evidence, Spano v. New York, 360 U.S. 315 (1959), and a conviction obtained in violation of the right to counsel cannot stand, Gideon v. Wainwright, 372 U.S. 335 (1963); even though no provision in the Bill of Rights makes these results mandatory.

The adoption of a good faith exception to the exclusionary rule would seriously curtail the development of Fourth Amendment law. The landmark cases defining the scope of the Fourth Amendment have reached this Court only because convictions were obtained on evidence allegedly seized unconstitutionally. In some of the cases the government prevailed while in others the accused was vindicated. But if a good faith exception to the exclusionary rule had been applicable, the constitutional question might have been avoided altogether. Furthermore, the likelihood of the applicability of a good faith exception may in many cases remove the incentive to appeal, thus denying this Court the opportunity to clarify permissible law enforcement behavior. Such would likely

have been the result in Terry v. Ohio, 392 U.S. 1 (1968), in which the Court articulated constitutional guidelines for field investigation procedures where none had previously existed. Every jurisdiction has relied on the announced Terry standards and, overwhelmingly, the government has prevailed. See Cook, Constitutional Rights of the Accused: Pretrial Rights s7, at 55 n.10 (1972 and Supp.).

Adoption of a good faith exception to the exclusionary rule would also significantly reduce the incentive for law enforcement institutions to govern their conduct by Fourth Amendment standards. In Delaware v. Prouse, 440 U.S. 648 (1979) this Court reversed the drug related conviction, holding that random stopping of cars for driver's license checks was unconstitutional. However,

the Court took the opportunity to note that stops which eliminated the potential for the "unbridled discretion" of the officers would be constitutional. Had the conviction been allowed to stand because of the good faith of the arresting officer, the decision might well be interpreted to mean that random vehicle stops, though unconstitutional, were permissible so long as the officer acted in good faith. While disingenuousness on the part of law enforcement officials may not be tolerated, ignorance of the law may lead to the same result.

Ostensibly, the case now before this Court presents the most appealing situation in which to apply the good faith exception to the exclusionary rule. The officer sought and obtained a warrant

before carrying out the search and therefore had every reason to believe the search was constitutional. Indeed, it could be argued that every search made pursuant to a warrant, except for the rare case of fraud or collusion, is made in good faith. Thus evidence so obtained would be admissible, not because supported by probable cause but rather because made in good faith. Such a result could hardly be more antithetical to the Fourth Amendment. A warrant issued without the requisite probable cause is constitutionally void as this Court has held. Good faith is not interchangeable with probable cause. Terry v. Ohio, 392 U.S. 1 (1968); Beck v. Ohio, 379 U.S. 89 (1964). To admit evidence seized under a warrant unsupported by probable cause

would substitute good faith for the explicit requirements of the Fourth Amendment and render judicial review of warrant affidavits superfluous absent an allegation of bad faith on the part of the officer or the issuing magistrate.

ARGUMENT

I. THE EXCLUSIONARY RULE IS AN INDISPENSABLE COROLLARY TO THE FOURTH AMENDMENT.

- A. The Fourth Amendment creates a personal constitutional right, and the exclusionary rule says no more than that the government should not gain from the denial of that right.

The Justices who held in Weeks v. United States, 232 U.S. 383 (1914) that evidence obtained in violation of the Fourth Amendment was inadmissible in federal prosecutions would "be quite surprised to learn that some day the value of the exclusionary rule would be

measured by--and the very life of the rule might depend on--an empirical evaluation of its efficacy in deterring police conduct." Kamisar, A Defense of the Exclusionary Rule, 15 Crim. L. Bull. 5 (1979). Rather, the exclusionary rule as originally articulated by this Court, rested on "a principled basis rather than an empirical proposition." Allen, The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases, 1975 U. Ill. L. F. 518, 536-37.

In Weeks, this Court said:

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under the limitations and restraints as to the exercise of such power and authority, . . . The tendency of those who execute the criminal laws . . . to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all

times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

. . . The efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles. . . . To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

Weeks v. United States, 232 U.S. 383, 391-92, 393-94 (1914). See also Schrock & Welsh, Up from Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251, 257-60 (1974); Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 377-78 (1981).

While the exclusionary rule deters unconstitutional police behavior (see IIC, infra), deterrence is an ancillary benefit of the rule. Opponents of the exclusionary rule have chosen to identify its principal, if not sole purpose as the deterrence of unconstitutional behavior by law enforcement officers. The debate regarding deterrence diverts attention from the fundamental justification for the exclusionary rule: the Fourth Amendment provides protection for the liberty, property and privacy of individuals, and the exclusionary rule vindicates any deprivation of these rights.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Like the

other provisions of the Bill of Rights, it recognizes a personal right and prohibits the violation of that right by the government. Id. The personal nature of the right protected by the Fourth Amendment has been acknowledged repeatedly by this Court in cases addressing the Fourth Amendment standing doctrine. Alderman v. United States, 394 U.S. 165, 171-72, 174 (1969) ("We adhere . . . to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." Id. at 174); Simmons v. United States, 390 U.S. 377, 389 (1968) ("[R]ights assured by the Fourth Amendment are personal rights, and . . . they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search

and seizure." Id. at 389).

More recently in Rakas v. Illinois, 439 U.S. 128 (1978), this Court, while ostensibly eliminating standing as a distinct inquiry in Fourth Amendment cases, emphasized the personal nature of the protected interest. In Rakas, the defendants sought suppression of evidence obtained in a search of the automobile in which they were passengers. The Court "reaffirmed the principle that the 'rights assured by the Fourth Amendment are personal rights [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure,'" Simmons v. United States, 390 U.S., at 389 . . ." Id. at 138.

Notwithstanding the consistently reaffirmed recognition that the Fourth

Amendment protects a personal constitutional right, more recently this Court has expressed the view that the exclusionary rule is not itself an aspect of that right. Stone v. Powell, 428 U.S. 465 (1976). Rather, this Court has taken the view that "[t]he primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." Id. at 486. The constitutional history of the Fourth Amendment, however, counsels that this assumption be reassessed.

The requirement of a personal interest, whether recognized as a standing requirement or as part of the constitutional protection itself, is strong indication that the primary purpose for the exclusion of illegally seized evidence is not to deter police misconduct. Were

this the case, the focus of attention would be primarily upon the actions of the law enforcement officers, not upon the party raising the objection. If the purpose of the exclusionary rule was to effectuate deterrence, this Court should have abolished the personal interest requirement in cases such as Alderman v. United States, 394 U.S. 165 (1969), and Rakas v. Illinois, 439 U.S. 128 (1978). In Alderman, elimination of the standing requirement clearly would have fostered deterrence, but this Court explicitly rejected that course:

The deterrent value of preventing the incrimination of those whose rights the police have violated has been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed . . . But we

are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Alderman v. United States, 394 U.S. 165, 174-75 (1969).

Indeed, if deterring unconstitutional police activity were the dispositive factor in applying the exclusionary rule, United States v. Payner, 447 U.S. 727 (1980), presented a most compelling case for the exclusion of evidence. In Payner, the trial court found that, as a matter of strategy in tax investigations, "the Government affirmatively counsels its agents that the Fourth Amendment standing limitations permits them to purposefully conduct an unconstitutional search and seizure of one individual in

order to obtain evidence against third parties, who are the sole targets of the governmental intrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel." United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977). The deterrent effect of excluding evidence so obtained is apparent, but this Court refused to apply the exclusionary rule holding, "[o]ur Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices." United States v. Payner, 447 U.S. 727, 735 (1980).

The assumption that deterrence is the

"primary justification" for the exclusionary rule is therefore difficult to reconcile with, first, this Court's emphasis on the personal nature of the Fourth Amendment protection and, second, its frequent refusal to exclude evidence where the deterrent effect of doing so was clear. Moreover, there is a lack of constitutional justification for treating deterrence as the "primary justification" for the exclusionary rule. Although the rigorous protection of constitutional rights inevitably entails the repudiation of official conduct which violates those rights, surely the pre-eminent reason for affording judicial relief is the mere fact that a right has been violated. Fourth Amendment claims offer nothing unique in this regard. An accused denied the Sixth Amendment right to counsel in a

criminal prosecution will have his conviction reversed solely because he has been denied a fundamental right. Gideon v. Wainwright, 372 U.S. 335 (1963). A salutary result of this decision may be to deter future courts from trying an accused without the assistance of counsel. But to justify the decision one need go no further than to observe that the party involved was denied a federal constitutional right. When a confession is suppressed because obtained by unconstitutional means, the effect of the decision will be to alter law enforcement practices to comply with articulated constitutional standards, but the primary justification for the holding is the vindication of rights protected by the Fifth, Sixth and/or Fourteenth Amendments. When this Court sustained the

right of a draft protester to carry a potentially offensive placard through the corridors of a court house in Cohen v. California, 403 U.S. 15 (1971), the decision may have encouraged greater governmental tolerance for unpopular and confrontational views, but the vindication of the First Amendment right of the petitioner was important enough, standing alone to support the decision. Cohen v. California, 403 U.S. 15, 24-25 (1971).

Proponents of modifying the exclusionary rule make the argument that individual rights must be balanced against societal needs for law enforcement. In its place, this is not only a plausible argument, but a central theme in this Court's interpretation of the Fourth Amendment. It is central to Chief Justice Warren's opinion for this Court in

Terry v. Ohio, 392 U.S. 1 (1968), legitimizing brief detention and frisks notwithstanding the absence of probable cause. The need to enforce prohibition laws generated an exception to the warrant requirement. See Carroll v. United States, 267 U.S. 132 (1925). The felt necessities of the times have sustained the practice of searching all persons boarding commercial air flights even though such practices would clearly have violated the Fourth Amendment in an earlier era. See e.g., United States v. Clay, 638 F.2d 889 (5th Cir.), cert. denied, 451 U.S. 917 (1981); United States v. Moreno, 475 F.2d 44 (5th Cir.), cert. denied, 414 U.S. 840 (1973); United States v. Bell, 464 F.2d 667 (2d Cir.), cert. denied, 409 U.S. 991 (1972); United States v. Epperson, 454 F.2d 769 (4th

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(1974); Comment, Searching for Hijackers:
Constitutionality, Costs, and Alterna-
tives, 40 U. Chi. L. Rev. 383 (1973).

In all these cases, however, the balancing process was employed in defining the scope of the protection of the Fourth Amendment. When used to support a modification of the exclusionary rule, however, something quite different is at issue. The argument is not that the Fourth Amendment protection should be tempered but that unconstitutional actions on the part of law enforcement

officers should be condoned. Never before has this Court held that practical needs could excuse governmental acts which were concededly unconstitutional. See Cann & Egbert, The Exclusionary Rule: Its Necessity in Constitutional Democracy, 23 How. L.J. 299, 319-20 (1980).

While it is implicit in virtually every action of this Court that behavior of parties other than those before the Court will be modified in an effort to comply with the Court's interpretation of the constitution, the primary concern of the Court is, and must be, whether constitutional standards have been satisfied in the case before it. If the government is found to have violated an individual's constitutional right, the government should not benefit from its wrong. To say that evidence seized in violation of

the Fourth Amendment may not be used to convict an accused is most notable for its obviousness.

- B. That the Fourth Amendment does not by its terms preclude criminal convictions based on illegally seized evidence does not distinguish it from other constitutional protections, the deprivation of which have required the reversal of convictions.

Efforts to belittle the constitutional significance of the exclusionary rule have been encouraged by this Court's observation that it is but a "matter of judicial implication," Wolf v. Colorado, 338 U.S. 25, 28 (1949). More recently, in Stone v. Powell, 428 U.S. 465 (1976) this Court expressed the belief "that the [exclusionary] rule is not a personal constitutional right," but rather "a judicially created remedy designed to

safeguard Fourth Amendment rights generally through its deterrent effect . . .

" Id. at 486. (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).

That these declarations are accurate is undeniable, but their significance is something less than might initially appear. While the Fourth Amendment contains no exclusionary rule, neither does any other provision of the Bill of Rights. Nowhere in the constitution does it say that illegally obtained confessions may not be admitted in evidence. Indeed, confessions are not mentioned in the constitution at all. Yet in Spano v. New York, 360 U.S. 315 (1959), this Court did not hesitate to order such evidence excluded, specifically noting that:

abhorrence . . . to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also

turns on the deeprooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods to convict those thought to be criminals as from the actual criminals themselves.

Id. at 320-21. See Kamisar, supra at 18-20. Nowhere in the Sixth Amendment does it say that when the accused has been denied the right of confrontation regarding a particular statement, such is to be excluded. But a conviction was reversed in Pointer v. Texas, 380 U.S. 400 (1965) upon a finding that "the Sixth Amendment's right of an accused to confront the witness against him is . . . a fundamental right and is made obligatory on the States by the Fourteenth Amendment." Id. at 403. Nowhere in the Sixth Amendment does it say that a conviction obtained in violation of the right to counsel cannot stand. But such was the

result in Gideon v. Wainwright, 372 U.S. 335 (1963), as well as hundreds of decisions following in its wake. In each of these instances, and many others, once this Court has found the substance of a constitutional right has been denied, the impropriety of permitting the government the advantage of the deprivation has been so self-evident that the question is rarely raised outside the context of harmless error.

Indeed, to say that the exclusionary rule is but a "matter of judicial implication" is to do little more than to describe the function of this Court in constitutional interpretation. As Professor Kamisar has noted, disparaging the exclusionary rule as "judicial implication" is not "much of a point . . . unless somebody can cite me one Supreme

Court case interpreting the Constitution that is not 'a matter of judicial implication.'" Kamisar, supra at 16. Indeed, this Court "cannot escape the demands of judging or making difficult appraisals." Haynes v. Washington, 373 U.S. 503, 515 (1963). It is its task to determine what the constitution commands beyond that which it literally says. The rationale for the exclusionary rule was forthrightly explained in Weeks: "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and, . . . might as well be stricken from the Constitution." Weeks v. United States, 232 U.S. 383, 393 (1914). That Court was unaware of any extraordinary "judicial implication" on

its part when it concluded that "[t]he efforts of the courts and their officials to bring the guilty to punishment . . . are not to be aided by the sacrifice of [Fourth Amendment] principles." Id. at 393. Six years later, Justice Holmes found this reasoning compelling in speaking for the Court: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). Indeed, the application of the exclusionary rule after the fact of the constitutional violation is conceptually indistinguishable from the requirement that the Fourth Amendment protections be complied with prior to the issuance of a

warrant to prevent a constitutional violation. In the latter case, a violation of the Fourth Amendment may be forestalled; in the former, the design is to resume the status quo ante, as if the search had not occurred.

II. THE ADOPTION OF A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE WOULD BE ANTITHETICAL TO THE PROTECTION OF LIBERTY MANDATED BY THE FOURTH AMENDMENT

A. The adoption of a good faith exception to the exclusionary rule would effectively diminish the substantive protection of the Fourth Amendment.

The refusal of a court to exclude evidence from a criminal trial when that evidence has been obtained as the result of a violation of the Fourth Amendment, is nothing less than a refusal to honor a constitutional right. This is true even if a civil rights action is available to vindicate the deprivation, or if internal

disciplinary sanctions are invoked against the offending officer. If the evidence is used to convict, then the constitutional right, that is the constitutional limitation upon governmental action, has been denied. The logic of the foregoing has never been questioned in the context of confessions: an involuntary confession may not be introduced in evidence. That the events that produced the confession might give rise to a tort claim, or an action for damages for the deprivation of a civil right, or the disciplining of the responsible officials, has no bearing on the admissibility of the confession at a criminal trial.

No member of this Court has taken the view that under no circumstances should illegally seized evidence be excluded.

Justice Frankfurter dissented from the holding of this Court in Mapp v. Ohio, 367 U.S. 643 (1961), yet he wrote for a unanimous Court in Rochin v. California, 342 U.S. 165 (1952), excluding evidence obtained by non-consensual stomach pumping. The lesson of Rochin is that at some point, any constitutionally sensitive judge "will not care about or even think about 'alternatives' to the remedy of exclusion; he will exclude the evidence however logically relevant and verifiable it be, or, if the court below admitted it, he simply will not let the conviction stand." Kamisar, supra at 30. The question, therefore, is not whether there should be an exclusionary rule but where the line should be drawn.

In the past, Justices have disagreed as to when the Fourth Amendment should

apply, substantively and jurisdictionally. The present dispute, however, begins with the assumption that a violation of the constitutional protection has occurred but maintains that under some circumstances the exclusionary rule nevertheless should not apply. Should this Court adopt any exception to the exclusionary rule, it would be tantamount to holding that certain violations of the Fourth Amendment--although most assuredly violations--are not deserving of protection. For all practical purposes, this is simply to say there was no violation at all. In no other area of constitutional rights has this Court held that a deprivation has occurred but vindication was unnecessary. In the words of one commentator:

Does a court that admits
the evidence in such a case not

manifest a willingness to "put up with" the unconstitutional conduct that produced it? If so, how can the police and the citizenry be expected "to believe that the government truly meant to forbid the conduct in the first place"?

Kamisar, supra at 33 (quoting Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 U. Crim. L.C. & P.S. 255, 258 (1961)). A deliberate and egregious deprivation of a Fourth Amendment right is obvious, and exclusion of evidence so obtained is not criticized by even ardent supporters of a good faith exception to the exclusionary rule. But any violation of a constitutional right, no matter how subtle, cannot be ignored. Indeed, the less flagrant violations may well be those for which the exclusionary rule is most important. As one commentator has noted, "The more violent and obvious infringements may be curtailed through

civil or criminal actions against the guilty officers." (emphasis added). Atkinson, Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures, 25 Colum. L. Rev. 11, 24 (1925). If good faith violations of the Fourth Amendment are not interdicted by the exclusionary rule, they will not be curtailed at all.

B. The adoption of a good faith exception to the exclusionary rule would curtail the development of Fourth Amendment law

The landmark cases which have shaped the meaning of the Fourth Amendment have reached this Court only because the victims of certain law enforcement methods have been convicted of crimes by use of evidence allegedly obtained in violation of the Fourth Amendment. The ultimate question in many of the more significant

precedents--Terry v. Ohio, 392 U.S. 1 (1968); Chimel v. California, 395 U.S. 752 (1969); Delaware v. Prouse, 440 U.S. 648 (1979); Katz v. United States, 389 U.S. 347 (1967); Payton v. New York, 445 U.S. 573 (1980); Chambers v. Maroney, 399 U.S. 42 (1976); Spinelli v. United States, 393 U.S. 410 (1969)--was the same: whether seized evidence should be excluded from the trial of the accused. In some of these cases the government prevailed; in others the accused was vindicated. But--and this is the important point--in all of these cases most observers would agree that the challenged acts of law enforcement officers were carried out in good faith.

Had a good faith exception to the exclusionary rule been in effect at the time these cases arose, it is doubtful

that most of them would have achieved any precedential significance. Judicial restraint counsels that courts avoid answering constitutional questions. (See Ashwander v. T.V.A., 297 U.S. 288, 341, 346-48 (1936) in which the concurring opinion of Justice Brandeis summarized the practice of this Court in avoiding constitutional questions. "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." Id. at 347.)). It follows that once the good faith of the officers has been determined and the evidence held to be admissible, there is no need to decide if a constitutional right was actually violated.

Even assuming courts would determine

the constitutionality of the officer's behavior, the case may never reach even a lower appellate court let alone the Supreme Court. See Mertens & Wasserstrom, supra, at 449-54. For example, in Terry, it would have been pointless for the defense to appeal the questions to this Court, for if anything is clear in the Terry case, it is that Officer McFadden is a model patrolman, responding to a set of suspicious circumstances in a highly professional, efficient and humane manner. Because a finding of good faith is inevitable, there would be no incentive for the accused to appeal, even if there were a strong possibility of success on the substantive issue.

The result in the case might be the same, but this Court would have been denied the opportunity to address an

important, and at the time of Terry, highly confused issue: the application of the Fourth Amendment to confrontations between law enforcement agents and suspects which fall short of arrest and search. By its careful examination of the questions in Terry, this Court did more than give its approval to the tactics involved in a particular field investigation. It gave stop and frisk practices general constitutional approval. It approved guidelines where none had previously existed for the instruction of law enforcement personnel in field investigation procedures. In the fifteen years since Terry, thousands of appellate decisions from every jurisdiction have relied upon its standards in scrutinizing field detentions and frisks, and in the overwhelming majority of

cases, the government has prevailed. See Cook, Constitutional Rights of the Accused: Pretrial Rights s7, at 55 n.10 (1972 & Supp.) This opportunity to provide meaningful parameters on the Fourth Amendment would have been lost had Terry gone unlitigated at the appellate level or unexplored by this Court in light of the good faith of the arresting officers. The same may very well be true in virtually every case in which this Court has made significant pronouncements on the meaning and scope of the Fourth Amendment. See Mertens & Wasserstrom, supra at 401 et. seq.

- C. The adoption of a good faith exception to the exclusionary rule would significantly diminish the motivation for institutions of law enforcement to govern their conduct by Fourth Amendment standards

A major thrust of the argument favor-
ing a good faith exception to the exclu-
sionary rule is that, so long as law
enforcement officers have acted in good
faith in executing their duties, nothing
will be accomplished by excluding the
evidence obtained even illegally, because
the reasonable belief of the officer in
the legality of his or her conduct pre-
cludes a deterrent effect. While the
deterrent effect of the exclusionary rule
should not be the dispositive question
before this Court, the argument in any
event fails to credit what Mertens and
Wasserstrom have identified as "systemic
deterrence." Mertens & Wasserstrom,
supra at 399 et seq.

Consider, for example, the decision
in Delaware v. Prouse, 440 U.S. 648
(1979). There, this Court held that the

"unbridled discretion" of a police officer in stopping at random an automobile to check the validity of the license of the driver could not be countenanced under the Fourth Amendment. While the dissent in Prouse observed that there was no allegation or evidence of abuse of discretion by the police officer, the majority of this Court was convinced that the potential for abuse was enough. Reversing the conviction because evidence obtained in violation of the Fourth Amendment had been admitted at trial, this Court used the opportunity to suggest that roadblocks set up to check the licenses of all drivers passing a particular point during a particular time period would not run afoul of the constitution, Delaware v. Prouse, 440 U.S. 648, 663 (1979), and the concurring

opinion added the caveat that something short of stopping all vehicles--every third vehicle, for example--would be acceptable as well.

There would appear little reason to doubt that the arresting officer in Prouse acted in good faith. Had a good faith exception to the exclusionary rule been employed to resolve that case, the constitutionality of the stop might never have been addressed. Even if the trial court did address the constitutional question, if a good faith exception were allowed and its application were fairly inevitable, the case would never have been appealed. Thus, law enforcement officers would still not know whether random traffic stops were constitutional, a determination that needed to be made, considering the uncertainty in that area

of law enforcement. See cases cited in Delaware v. Prouse, 440 U.S. at 651 nn. 2-3.

An even more ominous outcome could easily have resulted from the application of the good faith exception in Prouse. The message would be clear: the random stopping of an automobile with no particularized suspicion to check a driver's license violates the Fourth Amendment but if the defendant cannot demonstrate that the officer acted in bad faith in selecting him for the check (based, for example, on his race, or age, or the type motor vehicle), any evidence of crime fortuitously discovered will be admissible, notwithstanding the constitutional violation. This might encourage some law enforcement agencies to fail to communicate the most recent relevant constitutional decisions to their personnel. The

same lack of knowledge on the part of police may result even absent an intentional withholding of information. For example, in a rural setting police may not have the resources or the institutional structure to inform themselves of the latest constitutional mandates. In either event, if the policeman "on the beat" did not know that his selection of a car based on his "unbridled discretion" was unconstitutional and the defendant could not prove obvious bad faith, the policeman would surely testify to his own subjective good faith, and the evidence, even though obtained clearly in violation of the constitution, would be admissible. In short, the application of the good faith exception in Prouse may well encourage unconstitutional behavior so long as it is done in an acceptable manner.

This is, of course, not what this Court did in Prouse. It held the practice unconstitutional, and it excluded the evidence. The message to law enforcement officers was clear: random stops of motor vehicles without particularized suspicion will not be tolerated. License checks of motorists, without particularized suspicion, are nevertheless permissible if the element of unbridled discretion is removed. Stated simply, Prouse told law enforcement officials how to and how not to go about achieving what was concededly a legitimate objective. Implementation of the guidelines enables the police to obtain the information they seek while ensuring the protection of constitutional rights.

In the years since Prouse, the decision has frequently provided the controlling precedent in license check cases in

the lower courts. Sometimes convictions have been reversed for the same reasons this Court reversed Prouse. See e.g., Keenan v. State, 372 So.2d 1012 (Fla. Dist. Ct. App. 1979) (unreasonable stop under Prouse); People v. Kunath, 99 Ill. App. 3d 201, 425 N.E.2d 486 (1981) ("stop of the car was more in the nature of a mere hunch . . . rather than on specific and articulated facts . . ."); State v. Hilleshiem, 291 N.W.2d 314 (Iowa 1980); State v. Wilson, 388 So.2d 744 (La. 1980); Goode v. State, 41 Md. App. 623, 398 A.2d 801 (1979); State v. Westbrook, 594 S.W.2d 741 (Tenn. Crim. App. 1979). In other cases, however, law enforcement agencies have followed the guidance provided in Prouse, and convictions obtained as a result of evidence seized during license checks have been sustained, not

because the officers acted in good faith, but because they had acted in a wholly constitutional fashion. See e.g., United States v. Pritchard, 645 F.2d 854 (10th Cir.), cert. denied, 454 U.S. 832 (1981); People v. Carlton, 81 Ill. App. 3d 738, 402 N.E.2d 310 (1981); People v. John BB., 56 N.Y.2d 482, 438 N.E.2d 864, 453 N.Y.S.2d 158 (1982); State v. Shankle, 58 Or. App. 134, 647 P.2d 959 (1982). Indeed, Prouse has been used for direct guidance in some police departments. For example, "The written policy of the Roxbury (New Jersey) Township police department is to stop every fifth vehicle during certain light traffic hours." State v. Cocomo, 177 N.J. Super. 575, 579, 427 A.2d 131, 133 (1980). The court noted in a footnote that "In September 1979, the Morris County Prosecutor

strongly urged each municipal police department to adopt rules and procedures to adjust their police practices to the Prouse proscriptions. Along with a summary of Prouse, a set of regulations approved by the Attorney General of New Jersey was also forwarded to the chiefs." Id. at n.1. The evidence was not suppressed in the case, because the procedures adopted and used by the police were reasonable and constitutional. See also Mertens & Wasserstrom, supra at 399-401, for an account of similar actions taken by the District of Columbia Metropolitan Police.

The desirability of providing police with guidance so they may obtain information they need without fear of it being found inadmissible is self-evident. This interaction between the holding of this

Court and law enforcement agencies has led to the optimum result. The Fourth Amendment rights of motorists have been articulated clearly, while the practical needs of law enforcement have been given their due.

- D. The adoption of a good faith exception to the exclusionary rule in cases involving an improperly issued warrant would seriously erode the protection of the Fourth Amendment

The adoption of a good faith exception to the exclusionary rule would appear to reach its highest level of plausibility in cases such as the one presently before this Court in which the officer has sought and obtained a warrant before carrying out the search. When acting pursuant to a judicial order, which will carry a presumption of validity, the officer has every reason to believe the search is constitutional. This Court has

always favored the use of warrants, Terry v. Ohio, 392 U.S. 1, 20 (1968); United States v. Ventresca, 380 U.S. 102, 106-7 (1965); United States v. Lefkowitz, 285 U.S. 452, 464 (1932), and has implied a more lenient standard of probable cause might be appropriate when a warrant is obtained. In Aguilar v. Texas, 378 U.S. 108 (1964) this Court stated that "when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant.'" Id. at 111 (quoting Jones v. United States, 362 U.S. 257, 270 (1960)).

From this it might be argued that,

but for the rare case of fraud or collusion, searches made pursuant to warrants are made in good faith. The result would be that evidence obtained in virtually all warrant searches would be admissible, not because supported by probable cause, but simply because made in good faith.

Such a result could hardly be more antithetical to the Fourth Amendment. The Amendment states categorically that ". . . no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. It follows that any warrant issued without the requisite probable cause is constitutionally void and cannot provide justification for a search, and this Court has consistently so held. Franks v. Delaware, 438 U.S. 154 (1978) (if material in an affidavit is found to be

false and set aside and the "remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Id. at 156); Aguilar v. Texas, 378 U.S. 108 (1964)("the search warrant should not have been issued because the affidavit did not provide a sufficient basis for a finding of probable cause and . . . the evidence obtained as a result of the search warrant was inadmissible. . . ." Id. at 115-16). Nothing in the Fourth Amendment suggests that the requirement of probable cause can be replaced by good faith, and this Court has repeatedly held on the issue of probable cause that good faith can add nothing to facts which fail to satisfy

that requirement. Beck v. Ohio, 379 U.S. 89 (1964); Henry v. United States, 361 U.S. 98 (1959). As this Court observed in Terry v. Ohio, 392 U.S. 1 (1968):

And simple "good faith on the part of the arresting officer is not enough." . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Id. at 22 (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)). See also Hill v. California, 401 U.S. 797 (1971) ("subjective good-faith belief would not in itself justify either the arrest or the subsequent search." Id. at 804). To admit evidence seized under a warrant unsupported by probable cause would substitute good faith for the explicit requirements of the Fourth Amendment and render judicial review of warrant affidavits superfluous absent an allegation of bad faith

on the part of the officer or issuing magistrate.

CONCLUSION

Nearly thirty years ago, substantial commentary was generated by a footnote to this Court's opinion in Brown v. Board of Education, 347 U.S. 483 (1954), which had led some to the conclusion that racially segregated public schools were unconstitutional because such schools were empirically shown to be deleterious to the education of black school children. Commentators admonished the "dangerous precedent" if Brown turned upon the vagaries of the evidence of social scientists. See Cahn, Jurisprudence, 30 N.Y.U.L. Rev. 150 (1955); Wechsler, Principles, Politics and Fundamental Law:

Selected Essays, "Toward Neutral Principles of Constitutional Law," 43-47 (1961). Subsequent decisions of this Court made clear that these fears were unwarranted. Racially segregated facilities were unconstitutional for reasons of constitutional principle: the equal protection clause of the Fourteenth Amendment did not countenance racial classifications.

A comparable choice arises in the issue presented to the Court in this case. Advocates of an exception to the exclusionary rule wish to confine the enforcement of the Fourth Amendment to those cases in which a deterrent effect upon law enforcement practices can be shown. Just as the Equal Protection clause is not addressed to maximizing the

quality of education, so the Fourth Amendment is not concerned solely or even primarily with regulating the future behavior of law enforcement officers. To so hamstring the Fourth Amendment by the principle of utility would deny its stature as a fundamental constitutional right which, like all other provisions of the Bill of Rights, requires no other justification for rigorous enforcement and, therefore, for the foregoing reasons, Amicus Curiae, the Association of Trial Lawyers of America respectfully submits that the decision of the United States Court of Appeals for the Ninth Circuit, upholding the suppression of the seized evidence, should be affirmed.

Respectfully submitted,

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I hereby certify that on November 14, 1983, true and correct copies of the foregoing Brief for Amicus Curiae, The Association of Trial Lawyers of America, were deposited in the United States Postal Service with first class postage prepaid and properly addressed to the following counsel for parties to this appeal:

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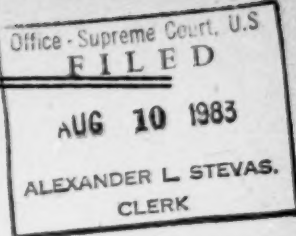
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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,
v.
ALBERTO ANTONIO LEON, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF FOR THE PEOPLE OF THE STATE OF
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QUESTION PRESENTED

Whether the Fourth and Fourteenth Amendments require suppression of evidence seized by police relying in good faith upon a search warrant issued by a judge who reasonably, if mistakenly, concluded that the supporting affidavit furnished probable cause.

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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

ALBERTO ANTONIO LEON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

BRIEF FOR THE PEOPLE OF THE STATE OF
CALIFORNIA AS AMICUS CURIAE

INTEREST OF THE PEOPLE OF THE
STATE OF CALIFORNIA

This case presents a recurrent application of the Exclusionary Rule, one which defeats the purpose of criminal trials--ascertaining truth--and

disserves an essential objective of the Fourth Amendment--encouraging resort to warrants. California's courts, like our federal courts, feel compelled by decisions of this Court to exclude evidence seized by police acting in good faith reliance upon a search warrant issued by a magistrate who reasonably, if mistakenly, concluded that the underlying affidavit supplied probable cause. Perhaps no application of the Exclusionary Rule is more inconsistent with its announced purpose of deterring police misconduct. Perhaps no other application of the Rule so offends the public conscience as suppressing the truth because a police officer has obeyed a judge's command. Our interest in protecting the integrity of our courts and the reliability of their verdicts brings the People of the State of California before this Honorable Court as amicus curiae.

SUMMARY OF ARGUMENT

A search warrant issued by a judicial magistrate should not be vulnerable to attack on the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indicia of probable cause as to render reliance upon it wholly unreasonable.

The present contrary rule began life as an accident, matured into an unexplained assumption, and survives as an obstacle to an essential objective of the Fourth Amendment--encouraging the use of warrants--and to the central purpose of criminal trials--ascertaining the truth. Embraced before the fundamental purpose of the Exclusionary Rule was clearly defined, the present practice is now seen as self-defeating; police are not deterred from engaging in unlawful conduct, but are instead

discouraged from doing precisely what the Constitution commands: securing a warrant from a neutral, detached magistrate.

The indiscriminate approach to suppression followed in Mapp v. Ohio (1961) 367 U.S. 643, 655, is irreconcilable with the balancing approach later adopted in Calandra v. United States (1974) 414 U.S. 338, restricting the Exclusionary Rule "to those areas where its remedial objectives are thought most efficaciously served." Id. at 348. Calandra and its progeny compel reexamination of the earlier decisions in Aguilar v. Texas (1964) 378 U.S. 108, overruled on other grounds, Illinois v. Gates (1983) 51 U.S. Law Week 4709, Whiteley v. Warden (1971) 401 U.S. 560, and Giordenello v. United States (1958) 357 U.S. 480. While the results in those cases may be consistent with our proposed rule, their rationale cannot be reconciled with Calandra.

Applying the reasonable, good faith standard inherent in this Court's recent decisions, the judgment of the United States Court of Appeals for the Ninth Circuit must be reversed.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE SUPPRESSION OF EVIDENCE SEIZED BY POLICE ACTING IN GOOD FAITH RELIANCE UPON A WARRANT ISSUED BY A JUDGE IN THE REASONABLE, IF MISTAKEN, BELIEF THAT THE SUPPORTING AFFIDAVIT SUPPLIED PROBABLE CAUSE.

1. Introduction

Amicus challenges the existing judicial practice of suppressing evidence seized under a warrant issued without probable cause. This Court has never explained why exclusion is a relevant, much less necessary, sanction for erroneous determinations by state magistrates. To this day, Aguilar v. Texas (1964) 378 U.S. 108, is a rule without a reason. Instead, the rule followed should be:

A search warrant issued by a judicial officer may not be attacked on the basis of inadequate affidavit support unless procured by material misrepresentation or unless so lacking in the indicia of probable cause as to render reliance upon it wholly unreasonable.

This Court first reversed a state court judgment on the basis of a deficient search warrant affidavit in Aguilar v. Texas. That decision has been widely accepted as authority for imposition of the Exclusionary Rule. See, e.g., United States v. Karathanos, 531 F.2d 26, 33, cert. denied (1966) 428 U.S. 910. In re Martinez (1970) 1 Cal.3d 641, 651 n.8, 83 Cal.Rptr. 382, 389 n.8. In fact, Aguilar did not impose the Exclusionary Rule either expressly or impliedly. The Court uttered not a single word on that subject because it was informed at page five of

the Brief for Respondent that a Texas statute, Article 727a, VACCP, enacted in 1925, provided:

"No evidence obtained by an officer or other person in violation of any provision of the Constitution or laws of the United States or of this State shall be admitted into evidence against the accused on the trial of any criminal case."

This Court decided only that the affidavit failed Fourth Amendment standards. Evidence obtained pursuant to the warrant based upon that affidavit was excluded by state statute not constitutional compulsion. Application of the Exclusionary Rule was not before the Court, much less decided, in Aguilar.

Nevertheless, two years later the Court filed its brief per curiam order

in Riggin v. Virginia (1966) 384 U.S. 152, declaring:

"The petition for a writ of certiorari is granted. The judgment is reversed. Aguilar v. Texas, 378 U.S. 108."^{1/}

Aguilar was not authority for reversal, however, because Virginia, unlike Texas, admitted illegally seized evidence as a matter of state law. Hall v. Commonwealth (Va. 1924) 121 S.E. 154, cited in appendix to Elkins v. United States (1960) 364 U.S. 206, 232. This Court, like the state appellate court, simply assumed that Aguilar authorized suppression. Riggin v. Commonwealth (Va. 1965) 144 S.E.2d 298, 301-302. In its pleading

1. The Court previously filed a similar summary reversal order in Barnes v. Texas (1965) 380 U.S. 253. In light of the Texas statute, Barnes added nothing to Aguilar.

before this Court the Commonwealth did not suggest otherwise. Thus, without argument, without a hearing, without explanation and, apparently, without consideration, Aguilar was deemed authority for a rule it did not announce.

Five years later, in Whiteley v. Warden (1971) 401 U.S. 560, a divided Court again suppressed evidence seized by state officers under a warrant issued without probable cause. Again, no explanation for exclusion was offered. This time, the single sentence ordering suppression was followed by a citation to Mapp v. Ohio (1961) 367 U.S. 643, instead of a reference to Aguilar. Since Mapp was not a warrant case, it did not add to the Court's legal reasoning.^{2/}

2. Ironically, Whiteley's author would have overruled Mapp. Coolidge v. New Hampshire (1971) 403 U.S. 443, 490 (concurring opinion of Mr. Justice Harlan).

In fairness, it must be noted that the warden's nine-page brief did not suggest the inappropriateness of applying the Exclusionary Rule.

Whiteley's reliance on Mapp was almost predictable since the Mapp plurality did declare, "We hold that all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court." 367 U.S. at 655. As applied to warrant cases, of course, the quoted language is dictum. That the dictum was followed in Whiteley is ultimately traceable to the fact that "the discursive prevailing opinion in Mapp v. Ohio . . . does not clearly identify the primary basis for the rule. . . ." Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L.Rev. 665, 670 (1970).

If Aguilar was accidental, Whiteley was not. Still, Whiteley was the product

of historical chance. This Court confronted the warrant cases before it clarified the fundamental purpose of the Exclusionary Rule: deterrence of police misconduct. Had the clarification preceded the application, a different rule should have emerged. This conclusion applies with equal force to decisions suppressing the fruits of warrant searches in federal criminal prosecutions. E.g., Nathanson v. United States (1933) 290 U.S. 41; Giordenello v. United States (1958) 357 U.S. 480; Spinelli v. United States (1969) 393 U.S. 410.

Amicus submits that recent decisions of this Court refining its purpose compel reformulation of the Exclusionary Rule invoked here by the Court of Appeals for the Ninth Circuit.

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2. Purposes of the Exclusionary Rule

A. The Personal Right Theory

Unlawfully seized evidence was first suppressed to remedy an invasion of the accused's personal Fourth Amendment right of privacy. Weeks v. United States (1914) 232 U.S. 383, 398; Connolly v. Medalie (2d Cir. 1932) 58 F.2d 629, 630. Under this theory evidentiary use of illegally seized property constituted a continuing violation of protected privacy. Bernardi, The Exclusionary Rule: Is A Good Faith Standard Needed to Preserve A Interpretation of the Fourth Amendment?, 30 De Paul L.Rev. 51, 56 (1908) Subsequently, this Court explained that

"The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim: '[T]he ruptured privacy of the victims' home

and effects cannot be restored.
 Reparation comes too late.'
Linkletter v. Walker, 381 U.S.
 618, 637 (1965)." United States
v. Calandra (1974) 414 U.S.
 338, 347. Accord, Elkins v.
United States (1960) 364 U.S.
 206, 217.

Since the constitutional violation is complete at the moment of unlawful intrusion, Stone v. Powell (1976) 438 U.S. 465, 540 (dissent of White, J.), subsequent use, direct or indirect, of the products of the intrusion "work[s] no new Fourth Amendment wrong." United States v. Calandra, 414 U.S. at 354-355. Abandonment of the personal right theory by severing the remedy from the right makes possible the complete repudiation of the Exclusionary Rule. Schrock and Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59

Minn. L.Rev. 251, 254, 271 (1974).

B. The Imperative of Judicial Integrity

The "imperative of judicial integrity" was the next doctrine devised to justify suppression of evidence. First styled the "clean hands" or "dirty business" doctrine, this concept originated as rhetoric inspired by the common desire of Justices Brandeis and Holmes to impose the Exclusionary Rule before accumulated experience had indicated the inadequacy of existing alternatives. Olmstead v. United States (1927) 277 U.S. 438, 470, 483-484 (dissenting opinions of Brandeis, J., and Holmes, J.). Both justices clearly identified their views as non-constitutional law, however. Id. at 466, 469-470, 479.

Thereafter, Elkins v. United States, 364 U.S. at 217, Mapp v. Ohio (1961) 367 U.S. 643, 660, and Linkletter v. Walker,

381 U.S. at 635, all contained a "ritualistic reference" to the "imperative of judicial integrity." Schrock and Welsh, 59 Minn. L.Rev. at 263.

The essence of the "imperative" has proved elusive. Sometimes couched in terms of judicial self-respect, it appears more concerned with public respect for the judiciary. Under this theory exclusion is necessary to avoid judicial complicity in unlawful police conduct. See Bernardi, 30 De Paul L.Rev. at 56-57. Acknowledged as non-constitutional law by its innovators, the doctrine has been criticized as unconstitutional by one commentator, Monaghan, The Supreme Court 1974 Term, Forward: Constitutional Common Law, 89 Harv. L.Rev. 1, 5 (1975), and as "a bootless and rarefied essence" by others, Schrock and Welsh, 59 Minn. L.Rev. at 265.

While a rhetorical success, the judicial integrity doctrine is an analytical failure. The reason is plain: "exclusion of valid, probative, undeniably truthful evidence undermines the reputation of and destroys the respect for the entire judicial system." Wilkey, The Exclusionary Rule: Why Suppress Valid Evidence?, 62 Judicature 214, 223 (1978). Accord, State v. Bisaccia (N.J. 1971) 279 A.2d 675, 676-677; Burger, Who Will Watch the Watchman, 14 Am. U.L.Rev. 1, 12 (1964); Thompson, The Burger Court in the California Crystal Ball, 5 S.W. U.L.Rev. 238, 240-241 (1973). Dean Barrett asks,

"Is not the court which excludes evidence in order to avoid condoning the acts of the officer by the same token condoning the illegal acts of the defendant?"

Barrett, Exclusion of Evidence Obtained by Illegal Searches - A Comment on People v. Cahan, 43 Calif. L.Rev. 565, 582 (1955). The public answers "Yes." "The solid majority of Americans rejects the idea that '[t]he criminal is to go free because the constable has blundered.'" Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L.Rev. 1027, 1035 (1974). Accord, Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 927 (1973). In 1981 a national magazine poll revealed that 70 percent of those asked had little or no confidence in the ability of our courts to convict and sentence criminals. NEWSWEEK, March 23, 1981, p. 49. "[T]he prototype of these complaints is enforcement of the exclusionary rule," Professor Kaplan adds. 26 Stan. L.Rev. at 1035-1036.

The Exclusionary Rule applies notwithstanding the inadvertent or minimal nature of the police intrusion or the heinous nature of the accused's offense. "[T]his lack of proportionality," Kaplan explains, "demonstrates why the exclusionary rule cannot be justified as a moral imperative preventing the courts from soiling themselves with tainted evidence." Ibid. Removed from the context of egregious police misconduct the judicial integrity doctrine becomes self-defeating.

The "imperative of judicial integrity" has not been the basis for deciding cases. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L.Rev. 665, 669 (1970). Despite the "imperative," defendants may be brought to trial although illegally seized outside the jurisdiction. Gerstein v. Pugh (1975) 420 U.S. 103, 119; Frisbie v.

Collins (1952) 342 U.S. 519. Their prosecutions may be initiated by indictments supported by illegally seized evidence. United States v. Calandra, 414 U.S. at 349-352. At trial, defendants may not challenge on Fourth Amendment grounds evidence that was obtained by police in violation of another's right of privacy. United States v. Salvucci (1980) 448 U.S. 83, 94; Alderman v. United States (1969) 394 U.S. 165. Nor may the accused object to evidence improperly seized by a private citizen. Burdeau v. McDowell (1921) 256 U.S. 465. Evidence indirectly derived from an unlawful search may be admissible if sufficient "attenuation" is shown, Brown v. Illinois (1975) 422 U.S. 590, and the direct fruits of the search may be used to impeach the defendant, Walder v. United States (1954) 347 U.S. 42. Even

if improperly admitted, unconstitutionally obtained evidence may be declared "harmless". Chapman v. California (1967) 386 U.S. 18. Evidence secured in violation of the Fourth Amendment may be considered for purposes of sentencing, United States v. Schipani (2d Cir. 1970), 435 F.2d 26, 28, cert. denied, 401 U.S. 983 (1972), and probation revocation, United States v. Vandemark (9th Cir. 1975) 522 F.2d 1019, 1021. Further, Fourth Amendment claims are unreviewable on habeas corpus. Stone v. Powell (1976) 428 U.S. 465; In re Sterling (1965) 63 Cal.2d 486. None of these decisions, nor those refusing to apply the Exclusionary Rule in civil proceedings, United States v. Janis (1976) 428 U.S. 433, or retroactively, Linkletter v. Walker, supra, Desist v. United States (1969) 394 U.S. 244, can be squared with the "imperative of judicial integrity."

The judicial integrity theory failed the retroactivity test. "[I]n Linkletter deterrence became the dispositive consideration in the exclusion controversy." Sunderland, Liberals, Conservative, and the Exclusionary Rule, 71 J. Crim. L. & C. 343, 352 (1980). "Indeed, all of the cases since Wolf [v. Colorado (1949) 338 U.S. 25] requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action." Linkletter v. Walker, 381 U.S. at 636-637. The retroactivity cases taught that judicial integrity is not impaired by the introduction of evidence seized in good faith reliance on existing constitutional norms. United States v. Peltier (1976) 422 U.S. 531, 537.

The deterrence rationale did not merely eclipse the judicial integrity

theory, it absorbed it. Relegated to marginal status in Calandra, 414 U.S. at 355, n.11, the judicial integrity doctrine ceased to exist independently in Michigan v. Tucker (1974) 417 U.S. 433, 450 n.25:

"It has been suggested that courts should exclude evidence derived from 'lawless invasions of the constitutional rights of citizens,' Terry v. Ohio, 392 U.S., at 13, in recognition of 'the imperative of judicial integrity.' Elkins v. United States, 364 U.S. 206, 222 (1960). This rationale, however, is really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide an independent

basis for excluding challenged evidence."

The Court's reasoning was elaborated in United States v. Janis, 428 U.S. at 458 n.35:

"The primary meaning of 'judicial integrity' in the context of evidentiary rules is that courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is completed by the time the evidence is presented to the court. See United States v. Calandra, 414 U.S. at 347, 354. The focus must therefore be on the question whether the admission of evidence encourages

violations of the Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose."

See also Stone v. Powell, 428 U.S. at 485; Tisnado v. United States (9th Cir. 1976) 547 F.2d 432, 456. Just as abandonment of the personal right theory makes possible complete repudiation of the Exclusionary Rule, the decline of the judicial integrity rationale clears the way for the Rule's reform.

C. The Deterrence Rationale

The fall of the judicial integrity doctrine marked the rise of the deterrence rationale. Deterrence has now become the "sole consideration" governing this Court's suppression of evidence. Sunderland, 71 Judicature at 353. Coincidentally, the

deterrence rationale appears to have come full circle. Always concerned with discouraging "unlawful police conduct," United States v. Calandra, 414 U.S. at 347, suppression of evidence originally was intended as a substitute for punishment of the offending officer. "Deterrence" meant that the officer would not have acted as he did had he known that the courts would exclude illegally obtained evidence. The critical element was the officer's state of mind: he should have known better. Thus Elkins and Mapp spoke of "removing the incentive" to disregarding Fourth Amendment rights. 364 U.S. at 217, 222; 367 U.S. at 656. This view was a natural consequence of the fact that Mapp and Weeks v. United States (1914) 232 U.S. 383, involved flagrant Fourth Amendment violations. See Traynor, Mapp v. Ohio

at Large in the Fifty States, 1962 Duke L.J. 319, 322.

As time passed and police methods improved the Court's focus shifted from sanctioning official misconduct to giving new substantive content to the Fourth Amendment. "Deterrence" came to mean motivation of "the law enforcement profession as a whole--not the aberrant individual officer--to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights." Dunaway v. New York (1979) 442 U.S. 200, 221 (concurring opinion of Stevens, J.). The Exclusionary Rule became a tool for expanding judicial review.

The broadened deterrence rationale is seriously flawed. It assumes that Fourth Amendment rules will be explicitly formulated and effectively communicated. In fact, neither condition exists.

Bernardi, 30 De Paul L.Rev. at 77 n.153. Instead, the rules governing search and seizure have been made hopelessly complex. Wright, Must the Criminal Go Free If the Constable Blunders?, 50 Tex. L.Rev. 736, 740 (1972). Rules which cannot be understood cannot deter. Additionally, "[t]here is reason to believe that the channels of communication between police and courts and prosecutors are such as to minimize the deterrent effect of the rule." Oaks, 37 U.Chi. L.Rev. at 730. Lack of communication between police and prosecutors is aggravated by the delay endemic to the judicial process. Few officers, apprised of the reviewing court's evaluation of their actions, can remember the specific circumstances in which, long ago, they acted. Moreover, the institutional deterrence concept fails to appreciate that the exclusion sanction

is powerless to deter conduct not directed at gathering evidence. Barrett, Personal Rights, Property Rights and the Fourth Amendment, 1960 Supreme Court Review 46, 54-55.

This Court recently recognized that an Exclusionary Rule disassociated from the state of mind of the acting officer does not deter. In Michigan v. Tucker (1974) 417 U.S. 433, 447, the Court said

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular officers, or in their future counterparts, a

greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

This Court has reinstated its original concept of deterrence, one that demands a plausible causal connection between the sanction of exclusion and the future conduct of the police.

D. The Judicial Review Function

The Exclusionary Rule serves a fourth purpose: it affords judicial review of Fourth Amendment claims, thereby allowing the Court to reformulate substantive rights. Judicial opinions rarely have alluded to this justification. United States v. Peltier, 422 U.S. at 554 (dissenting opinion of

Brennan, J.); Illinois v. Gates, 51 U.S.L.W. 4709, 4723 (concurring opinion of White, J.). Of course, one cannot reasonably expect a court to admit it suppresses the truth and releases criminals into society in order to provide grist for the judicial mill. Commentators have noted this function of the suppression doctrine, however. Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L & C. 255, 260 (1961); La Fave, 1 Search Seizure, A Treatise on the Fourth Amendment, 29, 33-34 (1978); Oaks, 37 U.Chi. L.Rev. at 756; Bernardi, 30 De Paul L.Rev. at 101; Sunderland, 71 Judicature at 373.

The substantive results of judicial access to the Fourth Amendment via the Exclusionary Rule have drawn mixed reviews. Professor La Fave concludes "[o]ne of the virtues of the exclusionary rule . . . is that it provides the higher

courts with a sufficiently steady diet of Fourth Amendment issues to make possible a meaningful shaping of constitutional standards governing arrest and seizure." 1 Search and Seizure at 33-34. Bernardi, on the other hand, argues that this Court has so compromised substantive privacy rights with evidentiary consequences that "the present exclusionary rule, instead of befriending the fourth amendment, may have become the primary hindrance to its liberal interpretation." 30 De Paul L.Rev. at 101. Bernardi would agree that "a remedy--restrictive result is preferable to a right--destructive result." Note, 55 Wash. L.Rev. 849, 861 (1980). To the extent that development of Fourth Amendment rights is influenced by either the distasteful consequence of suppression or by recognized limitations on the Rule's deterrent effect, e.g., Terry v.

Ohio (1968) 392 U.S. 1, 12-13, Bernardi correctly concludes that the purpose of judicial review is subverted. 30 De Paul L.Rev. at 81.

Whatever may be its substantive limitations, the Exclusionary Rule is thought to resolve two problems of judicial review: jurisdiction and incentive to litigate. Similar difficulties arise in the context of retroactivity. In Stovall v. Denno (1967) 388 U.S. 293, 306, speaking through Mr. Justice Brennan, the Court explained that "sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law," disfavor purely prospective decisions.

Justice Brennan's fear, expressed in dissent in Peltier, is that a rule which diverts judicial inquiry from the objective reasonableness of police conduct to the policeman's subjective state of mind will have the practical effects of discouraging defendants' Fourth Amendment claims and of restricting judicial attention to police motives. 422 U.S. at 554. Who will urge new law if the inevitable response must be that the challenged evidence is admissible because the officer acted in good faith reliance on old law?

A reasonable good faith standard, by retaining an objective element permits, even necessitates, judicial review. Bernardi, 30 De Paul L.Rev. at 101. "Only after the search and seizure has been determined to be illegal may the judge, ruling on the exclusion question, determine if the officer at

the time he acted knew or should have known that his conduct was impermissible." Note, The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects, 20 Ariz. L.Rev. 915, 942 (1978). For example, in United States v. Calandrella (6th Cir. 1979) 605 F.2d 236, 247-252, the reviewing court first decided that a search violated the rule of United States v. Chadwick (1977) 433 U.S. 1, then held Chadwick nonretroactive.

Linkletter v. Walker (1965) U.S. 618, 622 n.3, answers jurisdictional objections:

"It has been suggested that this Court is prevented by Article III from adopting the technique of purely prospective overruling. . . . However, no doubt was expressed of our power in

England v. Louisiana State
Board of Medical Examiners, 375
 U.S. 411 (1964)."

California's former Chief Justice
 agrees:

"Each part of the bifurcated
 decision springs from an actual
 controversy between the par-
 ties. . . . each part of the
 decision is essential to a
 proper resolution of the case.
 Neither is dictum."

Traynor, Quo Vadis, Prospective Over-
ruling: A Question of Judicial Respon-
sibility, 28 *Hast. L.J.* 533, 560 (1977).
 Accord, Currier, Time and Change in
Judge-Made Law: Prospective Overruling,
 51 *Va. L.Rev.* 201, 216-217 (1965);
 Beytagh, Ten Years of Non-retroactivity:
A Critique and A Proposal, 61 *Va. L.Rev.*
 1557, 1615 (1975).

Thus, a decision holding police conduct unreasonable in the constitutional sense but admitting evidence because the police acted in good faith and with a reasonable basis for the belief that their conduct was lawful does not constitute an advisory opinion forbidden by the case or controversy requirement of Article III of the federal Constitution.

The Court may feel it has presently available more cases than required to define the contours of the Fourth Amendment. See Arkansas v. Sanders (1979) 442 U.S. 753, 757. At all events, the Court need not worry about a lack of future litigants. As Justice Traynor points out, "institutional litigants with recurring interests in overturning legal rules would find incentive and reward enough" in achieving reforms regardless of whether their individual clients

directly benefitted. 28 Hast. L.J. at 547. Professor Beytagh concurs:

"A public defender's office, for example, would have considerable incentive to seek a change in constitutional rules even though the benefit would accrue only to those involved in later cases. So would other organizations that regularly represent criminal defendants.

. . . [T]he chances seem slim indeed that a constitutional issue of some importance, as to which a judge-made change in law is a reasonable possibility, will not be raised and presented effectively." 61 Va. L.Rev. at 1614.

3. Deterrence in the Balance

Assessing the deterrent effect of the Weeks rule, Mr. Justice Jackson

concluded in 1954,

"What actual experience teaches we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violations are not sanctions which put an end to illegal search and seizure by federal officers. . . . The extent to which the practice was curtailed, if at all, is doubtful."

Irvine v. California (1954) 347 U.S. 128, 135 (plurality opinion).

Empirical studies conducted since support no different conclusion today. Commentators uniformly pronounce these studies "inconclusive". E.g., Oaks, 37 U.Chi. L.Rev. at 709; Sunderland, 71 J. Crim. L. & C. at 365; Bernardi, 30 De Paul L.Rev. at 75; Canon, The Exclusionary Rule: Have Critics Proven

That It Doesn't Deter Police?, 62
 Judicature 398, 403 (1979); Schlesinger,
The Exclusionary Rule: Have Proponents
Proven That It Is A Deterrent To Police?,
 62 Judicature 404, 405 (1979).
 "[A]lthough scholars have attempted to
 determine whether the exclusionary rule
 in fact does have any deterrent effect,
 each empirical study on the subject, in
 its own way, appears to be flawed."
United States v. Janis, 428 U.S. at 449-
 450. Worse, reliable statistics do not
 appear to be forthcoming. Id. at 450-
 453.

Absent empirical evidence the
 Exclusionary Rule rests upon the assump-
 tion that it acts as a substantial and
 efficient deterrent. United States v.
Janis, 428 U.S. at 453. This is a pre-
 carious perch, for the Rule's deterrent
 force "is not so inherently likely that
 we can assume it to exist in the absence

of proof." Wright, 50 Tex. L.Rev. at 741. On the contrary, the presumption of deterrence conflicts with common experience. Undeniably, the Rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal." Terry v. Ohio (1968) 392 U.S. 1, 14. At the same time, "No deterrence is involved if the officers have acted in good faith on the facts as they appeared, because presumably they will be entitled to, and will, so act again in the future." People v. Gurley (1972) 23 Cal.App.3d 536, 553, 100 Cal.Rptr. 407, 419. Accord, Michigan v. Tucker (1974) 417 U.S. 433, 447. Police cannot follow rules they cannot fathom. In any event, the police officer infrequently learns that his actions have been judicially

condemned, Kaplan, 26 Stan L.Rev. at 1032, and the sanction of suppression is indirect, Schlesinger, 62 Judicature at 408. "With rare exceptions law enforcement agencies do not impose direct sanctions on the individual officer responsible for a particular judicial application of the suppression doctrine." Bivens v. Six Unknown Names Agents of Federal Bureau of Narcotics (1971) 403 U.S. 388, 416 (dissenting opinion of Burger, C. J.). Moreover, while the sanction is limited to evidence offered at trial, most cases are plea-bargained. Professor Oaks concludes: "As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure." 37 U.Chi. L.Rev. at 755. Although statistical evidence is inconclusive there are many reasons to doubt the Rule's efficacy as an indirect deterrent.

Recognition that deterrence is a fragile assumption rather than a hard fact made all but inevitable the balancing approach adopted in United States v. Calandra (1974) 414 U.S. 338. Calandra signalled a discriminating application of the suppression doctrine that is the antithesis to Mapp:

"As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." 414 U.S. at 348.

Balancing deterrence against potential damage to the role and functions of the grand jury, the Court found that "Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best," 414 U.S. at 351, and, therefore, refused to extend the Exclusionary Rule to grand

jury proceedings.

Following Calandra, the Court found insufficient deterrent effect to warrant extending the Exclusionary Rule to civil proceedings, United States v. Janis, 428 U.S. at 454, or to federal habeas corpus, Stone v. Powell, 428 U.S. at 487, 489-495. For the same reason the Court refused to suppress evidence seized incident to arrest pursuant to a subsequently invalidated statute, Michigan v. De Fillippo (1979) 443 U.S. 31, or evidence seized during a search conducted under long-standing judicially approved administrative regulations later held unconstitutional, United States v. Peltier, 422 U.S. at 538-542. In Michigan v. Tucker (1974) 417 U.S. 433, 446-447, deterrence was weighed and found wanting in a Fifth Amendment exclusionary context. These decisions are consistent with pre-Calandra rulings

limiting retroactive operation of new Fourth Amendment doctrine, e.g., Desist v. United States (1969) 394 U.S. 244, 254 n.24, and permitting impeachment use of illegally seized evidence, Walder v. United States (1954) 347 U.S. 62.

The reasoning in Calandra cannot be confined to considering whether to expand the scope of the Exclusionary Rule. Although each of the cited decisions refused to extend the Rule, for the same reason United States v. Salvucci (1980) 448 U.S. 83, 94-95, narrowed the Rule by overruling the "automatic standing" doctrine of Jones v. United States (1960) 362 U.S. 257. The Court's determination not to subvert the guilt determining process of a criminal trial by suppressing evidence unless "the sanction serves a valid and useful purpose," Michigan v. Tucker, 417 U.S. at 446, invites reform, not mere resistance to change. The logic

of Calandra's balancing approach leads ineluctably to the conclusion reached in United States v. Peltier, 422 U.S. at 542:

"If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

"The Constitution does not demand judicial overkill." People v. Carnesi (1971) 16 Cal.App.3d 863, 869, 94 Cal.Rptr. 555, 558.

Calandra, Tucker, Stone, Janis, Peltier, and De Fillippo lead to the conclusion that suppression is an irrelevant sanction when evidence is

acquired pursuant to a warrant issued by a judicial magistrate on the basis of an affidavit free of material misrepresentation. Indeed, one California court has reached that conclusion in dictum:

"The rule excluding evidence obtained by unconstitutional means was developed to deter unlawful police conduct. It has no reasonable application where police officers in good faith submit the question of whether they have probable cause for judicial evaluation." People v. Kirk (1974) 43 Cal.App.3d 921, 925, 117 Cal.Rptr. 345, 347. Accord, State v. Gerardo (N.J. 1969) 250 A.2d 130, 133.

Ironically, evidence is nevertheless suppressed when the police act exactly as the magistrate commands while, in various other situations,

evidence is admitted when the erring police have acted in reasonable good faith.

4. Present Acceptance of Good Faith
Exceptions to Exclusionary Rule

A good faith standard already has gained limited acceptance in the form of exceptions to the present Exclusionary Rule. These exceptions fall into two general categories: "technical violations" and "good faith mistakes." Mr. Justice Powell described as "technical" Fourth Amendment violations in which "officers in good faith arrest an individual in reliance on a warrant later invalidated or pursuant to a statute that subsequently is declared unconstitutional. . . ." Brown v. Illinois (1975) 422 U.S. 590, 611 (concurring opinion of Powell, J.) (Footnote deleted). Because suppression does not deter undesirable conduct in such cases

Justices Powell and Rehnquist would not apply the Exclusionary Rule. Id. at 612. In these circumstances suppression discourages desired police conduct.

In Michigan v. De Fillippo, the Court agreed, holding valid an arrest made in good faith reliance on a city ordinance later held unconstitutionally vague. "A prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional," the Court explained. 443 U.S. at 37-38.^{3/}

3. De Fillippo creates a qualified exception. Where the statute invoked does not define a substantive criminal offense but instead expressly authorizes searches and seizures infringing Fourth Amendment rights the Court has stricken the statute rather than upheld the search. Ybarra v. Illinois (1979) 444 U.S. 85, 96 n.11; Berger v. New York (1967) 388 U.S. 41. This distinction may be explained by the requirements of judicial review. Judicial scrutiny of a statute denouncing criminal conduct is a

(Footnote continued on next page.)

Deterrence is both unlikely and undesirable. "Society would be ill served if police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement." Id. at 38. Why a police officer may rely upon the constitutional validity of a legislative enactment but not upon a magistrate's assessment of constitutional sufficiency is a puzzle.

Footnote 3 continued:

necessary incident of affirming a conviction. Upholding executive actions taken under a search statute, however, effectively removes the legislation from court review. The difference between Peltier and Ybarra is that Almeida-Sanchez v. United States (1973) 413 U.S. 266, provided the Court the opportunity to invalidate the regulation under which the searching officer acted in Peltier. Having condemned the agency's regulation in Almeida-Sanchez, the Court could condone the officer's reliance in Peltier.

In warrant cases, of course, evaluation of the sufficiency of the supporting affidavit necessarily precedes inquiry into the bona fides of the magistrate or the officer.

That both questions are ultimately for judicial determination only heightens the mystery.

Just as De Fillippo and Peltier establish that law enforcement may rely upon a statute or regulation not "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws," Michigan v. De Fillippo, 443 U.S. at 38, the Court's retroactivity decisions make clear that officers may rely upon judicial decisions. E.g., Fuller v. Alaska (1968) 393 U.S. 80, 81.

Why police may rely on appellate court determinations but not upon those of trial courts or magistrates also remains unclear. State courts meanwhile have shown increasing reluctance to suppress evidence seized pursuant to defective warrants supported by probable cause.

People v. Lent (N.Y. Sup.Ct. 1980) 433 N.Y.S.2d 538, upheld a search incident to an arrest pursuant to a warrant, which, unknown to the arresting officer had been withdrawn. People v. Arnow (N.Y. Sup.Ct. 1981) 436 N.Y.S.2d 950, characterized a magistrate's failure to endorse a warrant for nighttime service as a "techincal defect" not requiring exclusion of evidence. Sternberg v. Superior Court (1974) 41 Cal.App.3d 281, 115 Cal.Rptr. 893, declined to suppress evidence because a magistrate had inadvertently neglected to sign the warrant after finding probable cause. Each opinion emphasized the good faith reliance of the police.

The "good faith mistake" exception includes both reasonable mistakes of law and of fact. Mr. Justice White has articulated its rationale:

"When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect. The officers, if they do their duty, will act in similar fashion in similar circumstance in the future. . . ." Stone v. Powell (1976) 428 U.S. 465, 540 (Dissenting opinion of White, J.).

This Court has accepted the good faith mistake of fact exception in another context. Franks v. Delaware (1978) 438 U.S. 154, limits attacks on warrant affidavits to false statements made intentionally or with reckless disregard for their truth.

Each of these good faith exceptions

is compelled by the balancing approach of Calandra. Just as the rationale of Calandra cannot be confined, these exceptions cannot be contained. In other words,

"The decisional history of the exclusionary rule following Mapp must be seen as a gradual, yet inexorable movement towards adoption of a good faith standard to govern application of the rule." Bernardi, 30 De Paul L.Rev. at 58.

Four Justices of this Court have expressed a willingness to so modify the Exclusionary Rule. Chief Justice Burger, concurring in Stone v. Powell, 428 U.S. at 536-542, Mr. Justice White, dissenting in Stone v. Powell, 428 U.S. at 536-542, and concurring in Illinois v. Gates, 51 U.S. Law Week at 4718, and Mr. Justice Powell, joined by

Mr. Justice Rehnquist, concurring in Brown v. Illinois, 422 U.S. at 609-612, all have supported some form of good faith test. Mr. Justice Blackmun recognized that good faith significantly reduces deterrence in United States v. Janis, 428 U.S. at 459 n.35. All subscribed to Peltier's dictum that the deterrent purpose of the Exclusionary Rule is served "only if it can be said that the law enforcement officer had knowledge, or may be properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 422 U.S. at 542.

Since the bulwark of the Fourth Amendment is the Warrant Clause, Franks v. Delaware, 438 U.S. at 164, and "[t]he entire thrust of the exclusionary rule . . . is to encourage the use of search warrants," People v. Moore (1973) 31 Cal.App.3d 919, 927, 107 Cal.Rptr. 590, 595, it makes no sense to discourage

police from seeking warrants from neutral, detached magistrates. Who is the Aguilar rule supposed to deter? If the police have acted as they should, suppression must sanction magistrates. But there is "no evidence for the assumption that lawlessness among federal magistrates is a pervasive problem akin to police lawlessness" which inspired adoption of the Exclusionary Rule. LaFave, 1 Search and Seizure, A Treatise on the Fourth Amendment, 3 (1978), quoting Professor Phillip Johnson. The same may be said in defense of state judicial magistrates.

5. The Good Faith Exclusionary Rule as an Objective Standard

Critics of the present Exclusionary Rule recognize its "important symbolic significance," Kaplan, 26 Stan. L.Rev. at 1055, and acknowledge that it

"teaches the importance attached to observing" Fourth Amendment guarantees. Oaks, 37 U.Chi. L.Rev. at 722. Critics of proposed good faith rules fear that "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." Beck v. Ohio (1964) 379 U.S. 89, 97. A good faith rule incorporating an objective element responds to both views: it reaffirms the importance of obeying the Fourth Amendment; it affords an avenue of judicial review; it avoids placing a premium on police ignorance; it averts suppressing the truth when no deterrent purpose can be served. Such a rule is offered in United States v. Peltier, 422 U.S. at 542:

"[E]vidence obtained from a

search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

To adopt the Peltier standard generally or to adapt it specifically to the warrant context is not to embrace the unknown. Useful guidance for applying the new rule is found in opinions elaborating the reasonable good faith defense to suits for damages under the Civil Rights Act, 42 U.S.C. § 2283. See generally, Note, The Proposed Good Faith Test for Fourth Amendment Exclusion Compared to the § 1983 Good Faith Defense: Problems and Prospects, 20 Ariz. L.Rev. 915 (1978). These decisions establish a qualified immunity from civil liability for reasonable, good faith actions.

"The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus the officer must allege and prove not only that he believed, in good faith, that his conduct was lawful, but also that his belief was reasonable."

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics (2d Cir. 1972) 456 F.2d 1339, 1348.

A belief is "reasonable" if it is "reasonable" in the tort sense, although not in the constitutional sense. Id. at 1348-1349 (concurring opinion of Lumbard, J.). This standard is consistent with the qualified immunity principles developed in Pierson v. Ray (1967) 386 U.S. 547, Scheuer v. Rhodes (1974) 416 U.S. 232, Wood v. Strickland (1975) 420 U.S. 308,

and Procunier v. Navarette (1978) 434 U.S. 555. The burden of proof as to both good faith and reasonableness is placed upon the government.

Reinforcing the objective element of the good faith defense to civil suits is the requirement that officers be aware of "settled, indisputable law" and "basic, unquestioned constitutional rights." Wood v. Strickland, 420 U.S. at 321-322. No less should be demanded of magistrates. Police are not expected to predict the future course of constitutional law, however. Pierson v. Ray, 386 U.S. at 557. No more should be demanded of magistrates.

"The law does not expect police officers to be sophisticated constitutional or criminal lawyers, but because they are charged with the responsibility of enforcing the law,

it is not unreasonable to expect them to have some knowledge of it." Glasson v. City of Louisville (6th Cir.) 518 F.2d 899, 910, cert. denied, 423 U.S. 930 (1975).

Consistently with this rule Peltier penalizes actions if an officer "had knowledge, or may properly be charged with knowledge," of their unconstitutionality. 422 U.S. at 542. This does not undermine the deterrent effect of the Exclusionary Rule, which depends upon police training programs. A reasonable good faith suppression standard would not discourage police legal training. Israel, Criminal Procedure, the Burger Court, and the Legacy of the Warren Court, 75 Mich. L.Rev. 1319, 1412-1413 (1975). Accord, Bernardi, 30 De Paul L.Rev. at 106. At the same time, "the good faith standard will prevent the government from choosing

to violate the fourth amendment willfully whenever it is prepared to pay civil damages as the price for securing desired evidence." Bernardi, 30 De Paul L.Rev. at 102. Cf. People v. Martin (1955) 45 Cal.2d 755, 760.

Our proposed rule governing warrant cases incorporates an objective standard. The good faith of the issuing magistrate and the executing police officer does not abrogate the Exclusionary Rule if the supporting affidavit is so lacking in the indicia of probable cause as to render official reliance upon it wholly unreasonable. The affidavits condemned in Nathanson v. United States, 290 U.S. at 44, Giordenello v. United States, 357 U.S. at 481, Aguilar v. Texas, 378 U.S. at 109, and Whiteley v. Warden, 401 U.S. at 563, for example, should fail our

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test.^{4/}

4. It is in the area of warrantless searches and seizures that the evidentiary consequence of a good faith Exclusionary Rule will be most felt. In the probable cause context "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." Bringar v. United States (1949) 338 U.S. 160, 176. Frequent disputes between trial and appellate judges and among reviewing judges themselves as to whether probable cause existed on a given state of facts suggests that the present standard does not leave enough room for police error. Stone v. Powell, 428 U.S. at 538, 540 (dissenting opinion of White, J.). Increased police training cannot substantially decrease police misjudgments regarding probable cause because "There is no exact formula for the determination of reasonableness. Each case must be decided on its own facts and circumstances." People v. Ingle (1960) 2 Cal.Rptr. 14, 17. Accord, Go-Bart Importing Co. v. United States (1931) 282 U.S. 344, 357. The reasonable good faith test will be more tolerant of police error, particularly when officers have acted in urgent circumstances. "An arrest is often a stressful and unstable situation calling for discretion, speed, and on-the-spot evaluation." Whirl v. Kern (5th Cir. 1969) 407 F.2d 781, 790. Studied reflection in judicial chambers often produces a decision different from intuitive response on dangerous streets. To the extent these perspective diverge, exclusion is unlikely to deter.

CONCLUSION

Suppression of evidence is self-defeating when the police do precisely what the Constitution commands: secure a warrant from a neutral, detached magistrate. Indeed, the oft-invoked "preference for warrants," United States v. Ventresca (1965) 380 U.S. 102, 109-110, may well spring from the understood absurdity of excluding evidence not because a constable has blundered, but because a magistrate has miscalculated. State v. Lien (Minn. 1978) 265 N.W.2d 833, 840 n.1.

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The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

DATED: August 4, 1983

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No. 82-1771

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,

VS.

ALBERTO ANTONIO LEON, et al.,
Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit

**BRIEF FOR THE CRIMINAL JUSTICE
LEGAL FOUNDATION AS AMICUS CURIAE
SUPPORTING REVERSAL**

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QUESTION PRESENTED

Whether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence obtained in the good faith, reasonable belief that the search and seizure at issue did not violate the Fourth Amendment.

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No. 82-1771

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OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
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On Writ of Certiorari to the United States Court of
Appeals for the Ninth Circuit

**BRIEF FOR THE CRIMINAL JUSTICE
LEGAL FOUNDATION AS AMICUS CURIAE
SUPPORTING REVERSAL**

**INTEREST OF THE CRIMINAL JUSTICE LEGAL
FOUNDATION**

The Criminal Justice Legal Foundation is a non-profit law firm organized to advance the public's interest in a system of criminal justice which accords full respect to their rights to the peaceful enjoyment of their lives, liberties and properties.

The exclusionary rule has come to symbolize to the public mind the plethora of technical rules of procedure promulgated to provide full respect to the rights of defendants without regard to the legitimate countervailing rights of victims and society. As a non-governmental advocate of these rights of the citizenry, the Criminal Justice Legal Foundation has a substantial interest in the outcome of this case.

SUMMARY OF ARGUMENT

The single point we intend to argue pertains to the weight of the interest represented by the petitioner in this matter. It is our contention that the *fundamental* obligation of a republican form of government is to provide for the safety and security of its citizens in the enjoyment of their lives and the fruits of their labors.

This obligation of government has been asserted since the early 17th century in this country. It continues to be invoked to our own day in the various states' constitutions.

In the 10th Amendment, the Federal government recognized the retention by the states of this obligation, which flows from possession of the reserved police powers. By agreeing to respect the reservation of these police powers to the states, the Federal government assumed an obligation to neither unnecessarily, nor unreasonably, hinder their exercise. The present "blanket" exclusionary rule violates this obligation.

Since the states' interest in the inclusion of evidence is incident to the states' reserved powers, the costs of the rule are subsumed within the same aura of Constitutional concern as is the exclusionary rule. Both interests in this controversy tend toward the furtherance of Constitutionally recognized values. Once this is realized, the costs of the present rule become prohibitive. Thus a good faith exception is mandated.

ARGUMENT

I

THE FUNDAMENTAL OBLIGATION OF THE AMERICAN POLITICAL SYSTEM IS TO PROVIDE THEIR CITIZENS WITH SECURITY FOR, AND PROTECTION OF, THEIR LIBERTIES

The Petition for Certiorari filed by the United States in this matter (hereinafter, *Petition*) indicates that the arguments it intends to submit in its brief will track those made by that party as amicus curiae in *Illinois v. Gates* U.S.

..... 76L Ed 2nd 527 (1983). *Petition*, 9. That argument posits that deterrence is the sole justification for the exclusionary rule, hence the rule must be analyzed in terms of benefits gained for costs paid. It proceeds to contend that when a police officer acts in good faith reliance on a search warrant, or the state of the law regarding warrantless searches, that the deterrent effect of the rule is at best minimal, perhaps even counter-productive. There is little we can add to the United States' persuasive and compelling presentation of this argument.

However, the cost-benefit analysis urged by the United States and utilized in various decisions over the years (e.g. *United States v. Calandra* 414 US 338, 351-352 (1974); *United States v. Ceccolini* 435 US 268, 280 (1978)) would profit by explication of the source and nature of the rights and interests forwarded by the United States.

The exclusionary rule itself is not one of constitutional necessity, but is instead a judicially imposed remedy meant to further the substantive content of the 4th Amendment. *Illinois v. Gates supra* at 538-539, (maj. opn.) 558-561 (White, J. conc.); *Calandra, supra* at 348; *Desist v. United States* 394 US 244, 254 n. 24 (1969). Hence it is neither purely constitutional nor purely non-constitutional in nature: it is instead a hybrid of constitution and social policy, or if you will, quasi-constitutional.

The interest of the state lies in introducing relevant, reliable, probative evidence of criminal wrongdoing, in fulfillment of the duties imposed through possession of the police powers.¹ These police powers do not take precedence

¹Because *Mapp v. Ohio* 367 US 643 (1961) imposes the Federal Exclusionary Rule upon the states, who carry on the overwhelming volume of police business in this nation, our concern, and this argument, is addressed to the effect of this imposition. Our approach is therefore from the vantage point of the states and their citizens, relevant here because of *Mapp*. We see no indication of a revival of *Wolf v. Colorado* 338 US 25 (1949). Were such an event to occur our argument would be either moot, or would await indications of the exact contents of such a bifurcated rule, as applied to the states.

over the 4th Amendment, as incorporated in the 14th. Nevertheless, the fundamental and basic obligation of the states to provide such protection, if recognized by the Constitution, colors the states' interest with shades of the same Constitutional color as the exclusionary rule. In such a case, exclusion stands proximate to one Constitutional guarantee, while inclusion of evidence supports the substantive content of another Constitutionally recognized fundamental value.

A. This Fundamental Interest and Obligation Is Deeply Rooted In Anglo American Legal and Political Theory

The antecedents of American political thought at the time of the Revolution can be traced back at least as far as classical Greece and Rome. B. Bailyn; *The Ideological Origins of the American Revolution* (Harv. Univ. Press 1967), 23-26 (hereinafter, *Bailyn*); G. Wood, *The Creation of the American Republic, 1776-1787* (Norton Library 1972), 6-7, 48-53 (hereinafter, *Wood*); B. Brown, *Great American Political Thinkers, Vol. 1* (Avon Books 1983), 3 (hereinafter, *Brown*). However, one event, and one person, overshadowed all others in the formulation of our constitutional theory—The Glorious Revolution of 1688, and its amendment of the British Constitution, and its principal apologist John Locke. See, e.g., James Otis, *The Rights of the British Colonies Asserted and Proved* (1764), John Adams, *Thoughts on Government* (1776), in *Brown, supra* 79, 168-169; see also *Wood, supra* 8-12, 20-21, 601-602; *Bailyn, supra* 26-30, 78-81, 123-132; B. Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* (Ox. Univ. Press 1977) 1-2, (hereinafter, *Schwartz*).² To view the Revolution of 1776-1789 in iso-

²*Schwartz* characterizes the American Revolution as a replay of the Glorious Revolution, "so signally commemorated in Locke's writings." While England moved into the 19th century, America dawdled in the 17th, in order to fully attain its share of the rights wrested from government in Stuart England. *Id.* at 31-32.

lation from these influences would be akin to analyzing the Russian Revolution of 1917 without benefit of reference to Marx and Engels.

"It is not simply that the great *virtuosi* of the American Enlightenment—Franklin, Adams, Jefferson—cited the classic Enlightenment text and fought for the legal recognition of natural rights. . . . They did so; but they were not alone. The ideas and writings of the leading secular thinkers of the Enlightenment . . . were quoted everywhere in the colonies, by everyone who claimed a broad awareness. In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contracts." *Bailyn, supra* at 27.

The members of this Court are not strangers to Locke's theory of government contained in his work, *The Second Treatise of Government*. The fundamental law of nature is the peace and preservation of mankind. In a state of nature each person possesses the executive power of this law, since without enforcement the law itself would be in vain. J. Locke, *The Second Treatise of Government* (Liberal Arts Press 1952), § 4-8 at 4-7 (hereinafter, *Locke*). Time and again Locke will return to his natural and inalienable trilogy of life, liberty and property. *See e.g.* § 131 at 73, § 136 at 77-78; § 137 at 78.

Men enter into civil government "for the natural preservation of their lives, liberties, and estates, which I call by the general name 'property.'" *Id.* § 123 at 71. Immediately Locke underscores this point.

"The great and chief end, therefore, of men uniting into commonwealths and putting themselves under governments is the preservation of their property. To which in the state of nature there are many things wanting." *Id.* § 124.

Those things wanting are a known and settled law, administered by an indifferent judge, supported by the power to

effect its execution. *Id.* § 124-126. Government thus exists as a trade-off—the natural rights of freedom to act without hindrance within bounds of natural law, and freedom to punish all violations of that law are surrendered in exchange for the civil rights of protection and security. *Id.* § 128-131 at 72-73. Locke is careful to point out that in entering this contract, man does not sacrifice his property interests to the state in exchange for protection from their private deprivations: “for no rational creature can be supposed to change his condition with an intention to be worse . . .” *Id.* § 131, see also § 138 at 79.

For Locke therefore, government has a two-fold obligation. First, affirmatively, to protect the property of the citizenry from private invasion. Second, negatively to refrain from invading that self-same property. Thus, the 4th Amendment. The first obligation inherent to the very nature of government, and being in large a state function, the amendment simply states the second obligation. To Locke, and within our constitutional framework, the protection, whether from private or public invasion, speaks to the single sphere of life, liberty and estate.

The duty of protection is the seat of one’s reciprocal obligations to the government. Police protection costs money. Therefore, “it is fit everyone who enjoys his share of the protection should pay out of his estate his proportion for the maintenance of it.” *Id.* § 140 at 80. Whenever government either acts to exercise absolute power over the citizenry, or stands by and allows others to attempt to do so,

“ . . . by this breach of trust they forfeit the power the people had put into their hands . . . and it devolves to the people, who have a right to resume their original liberty and . . . provide for their own safety and security, which is the end for which they are in society.” *Id.* § 222 at 124.

This necessarily follows from the principle that the people,

"... will always have a right to preserve what they have not a power to part with, and to rid themselves of those who invade this fundamental, sacred, and unalterable law of self-preservation for which they entered into society." *Id.* § 149 at 85.

The Declaration of Independence is simply a restatement of the above principles, and the consequent Revolution an actualization of their perceived dictates.

Locke's theory of government received affirmation in the two outstanding legal writers of the time, Coke and Blackstone. Coke, of course, preceded Locke, so that the influence may have run forward from Coke, but to the generation of the Revolution exposure would be contemporaneous.

"Lord Coke [was] widely recognized by the American colonists as the greatest authority of his time on the laws of England . . ." *Payton v. New York* 445 US 573, 593-94 (1980). His *Reports* and *Institutes of the Laws of England* were "avidly studied and reverentially cited" by generations of lawyers and judges on both sides of the Atlantic into the 19th Century. S. White, *Sir Edward Coke and "The Grievances of the Commonwealth"*, 1621-1628 at 11 (1979). Jefferson, Hamilton, Madison, John and Samuel Adams, Patrick Henry, James Otis and Joseph Story are among those who were versed in Coke's writings. A. Willing, *Protection By Law Enforcement: The Emerging Constitutional Right* 35 Rutgers Law Rev. 1 (1982), (hereinafter, *Willing*).³

Coke reported, and participated in, *Calvin's Case* 7 Co. Rep. 1a, 77 Eng. Rep. 377 (All Judges of England Assembled 1608). The reciprocal obligations of sovereign and subject gained expression in that case.

³See also *Schwartz, supra* 55-57; *Wood, supra* 453-463. Both discuss Coke's impact upon opposition to writs of assistance and the Stamp Act, as well as his influence on the genesis of the doctrine of judicial review.

"But between the Sovereign and the subject there is without comparison a higher and greater connexion: for as the subject oweth to the king his true and faithful ligeance and obedience, so the sovereign is to govern and protect his subjects . . ." *Id.* at 382.

This remains a "fundamental principle" of the British Constitution. T.F.T. Plucknett, *Taswell-Langmead's English Constitutional History* 338 (11th Ed. 1960). Coke, like Locke, felt that:

"In primus interest reipublicae, ut pax in regno conservetur, & quaecumq; paci adversentur, provide declinentur [it is the primary interest of the state to preserve peace in the kingdom, and prudently to decline whatever is adverse to it]: Which maxime hath been repeated and affirmed by authority of Parliament." 2 E. Coke, *Institutes of the Laws of England* at 158, emphasis in original.

Hence, the law abhors situations where offenses go unpunished. *Id.*; see also *Vaux's Case*, 4 Co. Rep. 44a, 76 Eng. Rep. 992 (K. B. 1591). For "[w]hosoever violates laws does not hurt certain citizens but goes about to overthrow the whole commonwealth. . . ." Coke addressing the House of Commons, in 4 Commons Debates 1628, 124 (R. Johnson, M. Keeler, M. Cole, and W. Bidwell, Eds. 1978).

Ultimately it was Blackstone who set forth the contents of the English Common Law, after Coke, the Glorious Revolution and Locke had made their impact upon it. Blackstone's *Commentaries on the Laws of England* were published in four parts between 1765 and 1769 and quickly found their way to the colonies. The first colonial printing of the *Commentaries* occurred in 1771-1772. *Willing, supra* 1 Rutgers Law Rev. at 34. It has been persuasively argued that Blackstone's objective was not to challenge the law, but to inculcate a general awareness of the rights and duties of Englishmen found in the Common Law. D. Boor-

stin, *The Mysterious Science of the Law* (1941) at 3-30, 109-119, 187-191. His widespread effect upon the colonists and framers has been noted on various occasions by members of the Court. See e.g. *Payton v. New York* 445 US 373, 600 (1980) (White, J. dissenting). "The inclusion of Blackstone on this list is particularly significant in light of his profound impact on the minds of the colonists at the time of the framing of the Constitution and the ratification of the Bill of Rights." Between 1925 and 1981 Blackstone was cited in 212 decisions of this Court. *Willing, supra* 1 Rutgers Law Review at 38.⁴

Locke's *Second Treatise* was published in 1690. By the time Blackstone wrote the *Commentaries*, some seventy-five years later, the Lockean interpretation of the Glorious Revolution had been fully assimilated into the law. Thus, beyond any specific references to Locke, his principles of government echo throughout the *Commentaries*. Thus Blackstone found there to be three principle rights: personal security, personal liberty and private property. This is simply a restatement of Locke's trilogy of natural rights, life, liberty and property, for the preservation of which man enters civil society. *Locke, supra* §§ 123-128 at 129-130. Locke of course spoke to the origin of civil government; Blackstone is instead describing the rights of British subjects under the constitution. Blackstone, *Commentaries on the Laws of England* (Univ. of Chi. Press (1979)) 120-135. These rights carry with them necessary subordinate rights, including the right to apply to the courts for redress of their infringement, since without a means of redressing violations, rights are without substance. This right Blackstone traces to the Magna Carta by way of Coke. *Id.* at 137.

The political or civil liberties of Englishmen exist in the entitlement to the regular administration of courts of justice, a right to petition King and Parliament when re-

⁴Coke has been cited in more than 70 decisions. *Id.*

dress is not obtained in the courts, and the ultimate right of armed self-defense when all else fails. These exist only to give substance to the three principal rights and are the direct end and purpose of the British Constitution. *Id.* at 140. Blackstone also wrote that government was founded upon compact, though to him the process is more implicit than to *Locke*. *Id.* at 47; *Locke, supra* § 13 at 9-10, §§ 128-130 at 72-73. Fears for the continued enjoyment and preservation of man's natural rights underlie the compact; thus the primary justification for civil government is the protection and security of those rights. 1 *Commentaries, supra*, 47-48; *Locke, supra* § 136 at 77-78.

Because of this, the same concept of reciprocity of obligation found in Coke and Locke finds expression in the *Commentaries*. Government is a contract, or a bargained exchange. On the one hand, the citizen accepts necessary limitations on his absolute natural rights. In return, government promises to protect the citizens' basic rights to life, liberty and property. Without the consideration of protection, the contract collapses. 1 *Commentaries* 74; *Locke, supra* § 97 at 55, § 222 at 123-124. Regardless of what occurs, in a state of nature or civil government, "[i]n all states and conditions, the true remedy of force without authority is to oppose it." *Locke, supra* § 155 at 88. To hold otherwise would be to violate the primary and inalienable law of nature—self-defense. 1 *Commentaries, supra*, 4.

Following these principles, the exercise of the police powers carried out in the administration of criminal justice quickly comes to the fore in the ranking of governmental obligations. There are two sorts of wrong, private, and public or criminal. The elevation of the status of the latter over the former flows from the fact that public injuries stop not with the generally incident private harm but repercuss to the community as a whole. 3 *Commentaries, supra* 2. This is due to the fact that such wrongs violate moral, or natural, as well as political rights; almost invariably involve a breach of the peace; and by example and

evil tendency threaten and endanger subversion of the whole society. They strike at the very core of governmental responsibility, undercutting its legitimacy. 4 *Commentaries, supra* at 177. Society quite simply cannot continue in existence if "... actions of this sort are suffered to escape with impunity." *Id.* at 5.⁵

Nor is Blackstone ignorant of the rationale that will later support the 4th Amendment. In discussing the crime of burglary that rationale is found, albeit implicitly and in a nascent state. He describes the seriousness of burglary (a capital offense at the time) as consisting in its invasion of the elemental rights to security and privacy in one's habitation. "And the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity." This extended to the civil process powers of the state, though not at that time to the criminal process. 4 *Commentaries, supra* at 223. The reasonability and warrant requirements of the 4th Amendment speak to one side of a single liberty. The crime of burglary, universally found in the United States, speaks to the other. That liberty is simply the right to security and privacy, a right which will countenance neither private, nor "unreasonable" public, invasion, be it of houses, persons, papers or effects.⁶

The reverse of this principle is that, in guarding against public invasions of these liberties, it makes no sense, and is in fact a dereliction to *unnecessarily* hinder their protection from private invasions. Rules regarding the exclusion of evidence which are overbroad i.e. insufficiently grounded in logic and experience to achieve their stated purpose, work precisely such a sacrifice.

⁵In this and subsequent quotations, I have taken the liberty of modernizing Blackstone's use of the letters s and f.

⁶Once persons, papers and effects are included, one must look for correlation not to burglary alone, but to other crimes as well. For example, larceny, robbery, kidnapping.

B. American Colonists Claimed the Protection of these English Rights and Liberties

The colonists, upon arriving in America, immediately set out to secure to themselves the rights, liberties, franchises, immunities and privileges due English subjects. The First Charter of Virginia (1606) stated that all settlers and their posterity "... shall have and enjoy all Liberties, Franchises and Immunities, . . . , as if they had been abiding and born, within this our Realm of *England* . . ." R. Perry, *Sources of Our Liberties* (Amer. Bar. Found. 1952) 44 (hereinafter cited as *Sources*). This claim of entitlement was voiced time and time again, throughout the colonies, up to the time of Independence. See e.g. *The Charter of Mass. Bay* (1629), *Sources*, *supra* 83, 93; *The Charter of Maryland* (1632), *id.* 108-109; *Maryland Act For The Liberties of the People* (1639), *id.* 151; *The Charter of Rhode Island* (1663), *id.* 169, 177; *The Resolutions of the Stamp Act Congress* (1765), *id.* 270; *Declarations and Resolves of the First Cont. Cong.* (1774), *id.* 287. There can be no doubt that at least by 1774, if not by 1765, the rights and privileges were precisely those set forth by Blackstone, whose writings furnished enhanced support in the colonies for the principles enunciated by Locke.⁷

Locke's theory of compact and natural law found further reinforcement in the theological/political theories independently imported with the Puritans. In the Mayflower Compact (1620) the title itself suggests a notion of social compact. Within the body of the compact, the Puritans expressly "covenant" to form a civil body politic to better

⁷For example, a pamphlet published in Maryland in 1722 protesting the Proprietor's denial of these rights specifically referred to Locke. *Sources*, *supra* 103. The Resolutions of the Stamp Act Congress contrasted, by placement in the first two sections, the duty of allegiance and the rights and privileges of English subjects, indicating familiarity with the concept of reciprocity traced back to Coke, *supra*.

order and preserve their existence in the New World. *Id.* at 69. This religiously based compact theory found acceptance beyond its Puritan adherents, and after a period of partial secularization "... emerges from the political literature as a major source of ideas and attitudes of the Revolutionary generation" *Bailyn, supra* 32. See, for example, John Winthrop contrasting natural absolute liberty, and the dangers of the natural state, with civil society. J. Winthrop, *A Little Speech on Liberty* (1643), *Brown, supra*, 22-23. The American Revolution was not only a philosophical revolution, which proceeded on the basis of long thought and discussion as to nature of man and government. It was a Revolution which could proceed based on an amazing unanimity of thought.

"It seemed indeed to be a peculiar moment in history when all knowledge coincided, when classical antiquity, Christian theology, English empiricism, and European rationalism could all be linked. Thus Josiah Quincy, like other Americans, could without any sense of incongruity cite Rousseau, Plutarch, Blackstone and a seventeenth century Puritan all on the same page. *Wood, supra* 7, footnote omitted.

The principles fired in this crucible remain significant not simply as historical data, but continue to shape the self-understanding of the American polity. A review of contemporary state constitutions will present repeated reference to natural and inalienable rights, the protective purpose of government, the sovereignty of the people, their right to reform or abolish government when its protective purpose is not met, the social compact, and the reciprocal obligations of protection and allegiance between government and citizen.⁸

⁸See e.g. Ariz. Const. Art. II, § 2, "all political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." This was written in 1912. In 1974 the citizens of

One of the most influential of pre-Revolutionary documents was the Pennsylvania Frame of Government of 1682. Therein, the need for government is premised on the depravity of man (see Federalist Papers Nos. 6, 10, 15 and 51) and establishes a twofold basis of government: to "terrify evil doers" and to "cherish those that do well," *Sources*, *supra* 209-210. This entails a two part obligation: *To support power in reverence with the people, and to secure the people from the abuse of power . . .* for liberty without obedience is confusion, and obedience without liberty is slavery." *Id.* at 211, emphasis in original. In this single statement lies the concept of government which would come to fruition in the state and Federal constitutions during the following one hundred plus years. The "American Constitution" evolved into a document which meets two fundamental purposes. First, it describes the powers granted by the people for security of their liberties. Second, it guarantees that the government will not itself trample those liberties. Since it is a dual protection of the same field of liberties, both sides are equally fundamental—neither can be allowed to take precedence over the other without imperiling the whole.

Examination of the two most significant state constitutions of the Revolutionary period illustrates this reality. The Constitution of Virginia was adopted in 1776 at the beginning of the period of highest ferment, and served as a model to six other states and Vermont in the drafting of

California amended their Constitution to add the following to the Declaration of Rights: "Section 1. All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and attaining safety, happiness and privacy." See also Const. of Conn. (1965) Art. I § 1, "social compact"; Const. of Ken. (1891) Bill of Rts. § 3, "social compact"; Const. of Ill. (1971) Preamble and Art. I § 1, government to secure health, safety, welfare, and natural rights; Const. of HI. (1978) Art I § 2, natural law and reciprocity of obligations; Const. of Montana (1972) Declaration of Rts, Art II, § 3 inalienable rights and reciprocal obligations.

their bills of rights. *Sources, supra*, 309. The Massachusetts Constitution was drafted fourteen years later. The intervening events provided data for reflection and the development of a fully mature model of constitutional government. "Framed by the people, the document states clearly the rights for which the people fought the Revolutionary War." *Id.* 371.⁹

The Virginia Declaration posits a compact theory of the state, based upon inalienable natural rights: "namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." *Sources, supra* 311. The end of government is simply the "common benefit, protection and security of the people . . ." *Id.* Inability or unwillingness to meet this end raises from potentiality the inalienable right to reform, alter or abolish the government. These provisions are contained in two of the nine sections which "state *fundamental* general principles of a free republic." *Schwartz, supra* 70, emphasis added. The fact two prominent Anti-

⁹Regarding Virginia's Declaration of Rights it has been stated: "By 1776, a consensus had clearly developed in the former colonies on the fundamental rights the law should protect. In giving specific content to those rights, Mason gave expression to the shared thoughts of the day on individual rights: in doing so he was more the codifier than the transforming innovator." *Schwartz, supra* 70. Of signal importance was the *total* reliance on natural law theory, premised largely on Locke's Second Treatise. *Id.* 69-72.

The Massachusetts Constitution was rejected on the first ratification attempt in 1778, due in large part to the absence of a bill of rights. Such a declaration was perceived as valuable consideration for the restriction on natural rights accepted upon entry into a civil state. The Declaration of Rights drafted stands as a summary of fundamental rights at the close of the Revolutionary period. It was used as the basis for the recommendations for a Federal Bill of Rights by Massachusetts in 1788. Massachusetts was the first state to request such a bill as the price of ratification. *Id.* 81-83. This constitution has been characterized as the most consequential of the period. *Wood, supra* 568.

Federalists, George Mason and Patrick Henry, composed this document in cooperation with perhaps the greatest Federalist, and author of the Federal Bill of Rights, James Madison, underscores the universal acceptance of the fundamental nature of these rights.

Fourteen years later Massachusetts came to the same conclusion—the state must work to ensure safety and prosperity, through the guarantee of man's natural rights to enjoy and defend his life and liberty, and acquire, possess and protect property. Preamble and Art. I. *Sources, supra* 373-374. See also Art. VII for a restatement of governments duty to provide protection and safety. *Id.* 375. Massachusetts also guaranteed the right to redress for all persons suffering injury (Art. XI), the right to dissolve government when it fails of its purpose of "protection, safety, prosperity, and happiness" (Art. VII), and recognized the reciprocal obligations of state and citizen (Art. X). *Id.* 375-376. In addition, Massachusetts originated the reserve powers clause. Art. IV, *id.*

Both documents illustrate the fundamental, constitutional value of the rights addressed in the Declaration of Independence and the Preamble to the United States Constitution.¹⁰ The balance of rights becomes clearer through analysis of these constitutions. Given the manner of recognition of the absolute fundamentality of the rights to security and protection, those interests cannot fairly be characterized in terms of social policy or desirable, but secondary goals, of government. They are its only legiti-

¹⁰ Accord; *Const. of Penn.* (1776)—end of government is to secure and protect natural rights; failure to do so allows citizens to dissolve the government; inalienable right to enjoy, protect and defend life, liberty and property; right to protection bears reciprocal obligations. *Id.* 329-330. *Delaware Decl. of Rts.* (1776) *id.* 338-339; *Const. of Maryland* (1776) *id.* 364-365; *Const. of N.H.* (1784) *id.* 382-384. All refer to the same purpose of government, and guarantee protection from private and public oppression. Moreover, all, explicitly or implicitly, reserve the police powers to the people.

mate purpose, and the balance must be kept true in rules of criminal procedure so as not to unnecessarily risk their denial by either state or private action.

II

THIS FUNDAMENTAL OBLIGATION IS RECOGNIZED BY THE BILL OF RIGHTS, AND RESERVED TO THE STATES AND THE PEOPLE, IN THE 10TH AMENDMENT

"While the Federalists gave us the Constitution . . . the legacy of the Anti-Federalists was the Bill of Rights." H. Storing, *What the Anti-Federalists Were For* (Univ. Chicago Press, 1981) (hereinafter, *Anti-Federalists*) 65. Thus, the concerns of the Anti-Federalists with regard to the necessity of a Bill of Rights provide guidance in analyzing the intent of various provisions thereof.

Despite their titular contrast, the Federalists and Anti-Federalists shared a broad common ground. The purpose of government was to regulate and protect the citizen's individual rights. An exchange was made in entering government whereby restrictions on natural rights are accepted in return for the secure and peaceful enjoyment of civil rights, and any constitutional scheme should be judged first and last from the perspective of the individual's interest in the preservation of life, liberty and property. *Id.* 5-11, 53. The dispute between these two parties focused on the best means to secure those ends.

For the Anti-Federalists, the continued, independent existence of the states was crucial. This insistence on

" . . . the primacy of the states rested on their belief that there was an inherent connection between the states and the preservation of liberty, which is the end of legitimate government." *Id.* 15.

Robert Whitehill, in Pennsylvania, and Patrick Henry, in Virginia, stated fears that the proposed United States Constitution would annihilate the states' constitutions and with

them the people's liberties. *Id.* Luther Martin described the relation of the citizenry to their dual governments in the following manner:

"[T]o [the states] they look up for the security of their lives, liberties and properties: to these they must look up—The federal govt. they formed, to defend the whole agst. foreign nations, in case of war, and to defend the lesser states agst. the ambition of the larger" *Id.*, footnote omitted.

The states possess "[t]he governments instituted to secure the rights spoken of by the Declaration of Independence" *Id.*

Although hindsight and one hundred ninety-four years of history have served to highlight federal authority, the Anti-Federalist preference for the state constitutions as the repository of the people's liberties was well grounded. During the Revolutionary period the drafting of those constitutions overshadowed every other event and demanded the attention of the best minds. Americans understood that they had a unique opportunity to start afresh in the formation of government, and given the vacuum of authority at the time, social compact theory attained existential validation. *Id.* 127-129; see also *Schwartz, supra* 53, 66.

Because the police powers were properly within the states' sphere of activity, and because the happiness of the citizenry depended on that power above all others, the Anti-Federalists desired a system of parallel governments. *Anti-Federalists, supra* 31-32, footnote omitted. This would require the explicit reservation of the authority of the states, for

"[w]ithout an express declaration 'in favor of the legislative rights of the several states, by which their sovereignty over their citizens within the state should be secured,' the states would 'be preserved only during the pleasure of Congress.'" *Id.* 34-35, footnote omitted.

The Federalists argued that the respective spheres of authority enjoyed by the Federal and state governments were sufficiently delineated by the various declarations of rights in the state constitutions, and the common law. The Anti-Federalists countered that the new Constitution was an "original compact." As such, it

"... is not dependent on any other book for an explanation, and contains no reference to any other book. All the defences of it, therefore, so far as they are drawn from the state constitutions, or from maxims of the common law, are foreign to the purpose" Agrippa, cited in *Anti-Federalists*, *supra* 66-67, footnote omitted.

The strength of the general powers allocated to the Federal government under the new Constitution required an explicit reservation of the powers retained by the states and the people. The 9th and 10th Amendments were, therefore, adopted with the specific purpose of guaranteeing the natural and civil rights of the citizens to safety, security and protection.

The importance of the 10th Amendment, with its reservations of the police powers to the states, is illuminated upon review of the proposals for provisions in a Bill of Rights submitted by eight states. Only one recommendation appears in all eight formulations—that powers not delegated to the federal government be declared as the reserve of the states. *Schwartz*, *supra* 158. These proposals reflected "the consensus that had developed among Americans with regard to the fundamental rights that ought to be protected by any Bill of Rights worthy of the name." *Id.* 157. By comparison, religious freedom was proposed by six states, guarantees of free press and jury trial as well as restrictions on searches and seizures in five, bail, speedy public trial and cruel and unusual punishment provisions in four, and the guarantees to confrontation, notice, counsel and acknowledgement of rights retained by the people in three. *Id.* 157-158. In this light, the 10th Amend-

ment serves to provide the same balance as that seen in the state constitutions. The 1st, 3rd, 4th, 5th, 6th, 7th and 8th Amendments secure the people from governmental invasions of their liberties. The 10th, along with the 2nd and the 9th, speak to the right to be free from private invasions of those liberties. A single purpose for the Bill of Rights is arrived at by way of this analysis, justified rationally and historically. It is to keep the liberty of the people whole and inviolate, no matter what the character of the invasion. The continued validity of this historical concern is documented in the unceasing invocation of the principles of natural law and the social compact by the American electorate.¹¹

A. The Court Has Recognized the Constitutional Grounding of this Fundamental Right

Roe v. Wade 410 US 113 (1973) speaks to the instant issue as an example of the balancing process which must occur when the fundamental state interest of providing protection and security is counter poised to a personal liberty interest.

Although concerned with abortion rights, as opposed to typical issues of criminal procedure, the contending forces

¹¹A majority of state constitutions continue to predicate the existence of government on its ability to beneficially protect society, and do so in their bills of rights. E.g. Ala. Art I §§ 1 & 2; Alas. Art. I. §§ 1 & 2; Ark. Art. II §§ 1 & 2; Ariz. Art. II § 2; Cal. Art. II § 1; Colo. Art. II §§ 1 & 2; Conn. Art. I § 2; Idaho Art. I § 1; Ill. Preamble, Art. I § 1; Ind. Art. I § 1; Iowa Art. I § 2; Kan., Bill of Rights § 1; Ken., Bill of Rights § 4; LA Art I § 1; Maine Art. I §§ 1 & 2; Maryland, Dec. of Rights, Arts. 1 & 6; Mass. Preamble, Dec. of Rights Arts. VII & X; Minn. Art I § 1, Miss. Art. 3 §§ 5 & 6; Mont. Art. II, §§ 1-3; Neb. Art I § 1; Nev. Art. I § 2; Ore. Art. I § 1; N.J. Art. I § 2; N.H., Bill of Rights Arts. 1-3; N.C. Art. I §§ 1-3; N.M. Art. II §§ 2-4; Ohio, Art. I § 2; Penn. Art. I § 2; Tenn. Art. I §§ 1 & 2; Utah Art. I § 2; Wis. Art. I § 1; Wy. Art. I § 1. Note the immediate recitation of this right in these declarations. It is a first principle of government. See also n.8 *supra*.

at work in *Roe* are remarkably similar to those instantly present. The challenged abortion law was enacted pursuant to Texas' police powers. The state's interest in producing reliable, probative evidence during criminal proceedings is similarly an act necessarily incident to giving meaningful reality to general police powers. The appellant was asserting a constitutional right to abortion, located in the Bill of Rights. In the instant matter, it is the 4th and 14th Amendments which are being invoked on behalf of a device intended to give effect to their dictates. Thus, exercise of the police powers is alleged to violate certain liberty interests in both cases.

The right to an abortion is grounded in the 14th Amendment's concept of personal liberty. *Id.* 153. The right is not absolute, however, but finds qualification in "important state interests." *Id.* 154. While the source of these interests is not explicitly stated, it's noted that to withstand scrutiny where "fundamental rights" are regulated, there must be a "compelling state interest." *Id.* 155. The analysis by the Court goes on to hold,

"... a state may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point . . . , these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. *Id.* 154.

The balance is struck by assuring that the law be "... narrowly drawn to express only the legitimate state interests at stake." *Id.* 155.

With regard to the state interest in the mother's health, compulsion exists at the point where regulation *reasonably* relates to the preservation and protection of her health. *Id.* 162-163. For the fetus this point is gained at viability. From then forward abortion may be totally proscribed except at the cost of the health and safety of the mother's existent life. *Id.* 163-164.

Analogical application of this rationale is apparent. The exclusionary rule is not a constitutional right, but is meant to serve as a remedial deterrent. The state's interest in introducing evidence is incident to its constitutionally recognized and reserved power to provide for protection of life, liberty and property. As a compelling state interest it should be allowed to limit ancillary constitutional remedies when those remedies do not "reasonably relate" to their intended object. Use of the "strict scrutiny" scheme of review makes eminent good sense when what is at stake are two quasi-Constitutional rights.¹²

A blanket application of the exclusionary rule extends its reach beyond its justification of deterrence, sacrificing its reasonableness. Since this, in turn, unreasonably burdens a fundamental right, it cannot be allowed to stand. Thus a good faith exception works to most efficaciously "hold the balance true" (*Gates, supra*, 76 L Ed 2d at 550) with regard to "'the most basic function of any government': 'to provide for the security of the individual and of his property.'" *Id.*, 76 L Ed 2d at 547, citations omitted.

Our analysis finds support in two recent decisions by the Court. Chief Justice Burger, writing for the majority in *Morris v. Slappy* US, 75 L Ed 2d 610, 621 (1983) stated that error which clearly impaired a constitutional right of a defendant could not be allowed. "But in the administration of criminal justice, courts may not ignore the concern of victims." The exclusionary rule is, of course, such an administrative rule.

¹²The term quasi-constitutional is intended to refer to the fact that within the parameters of the present controversy, the exclusion or inclusion of evidence serves a remedial purpose with respect to certain constitutional guarantees. Exclusion is intended to remedy, through deterrence, rights recognized in the 4th and 14th Amendments. The inclusion of evidence is incident to the guarantee of protection and security afforded by the states, recognized and reserved thereto in the 10th Amendment.

Michigan v. Long US, 103 S. Ct. 3469 lends implicit support to our contentions regarding the respective weight of the interests represented in the instant case. When the Court imposed the Federal Exclusionary Rule upon the states, by way of the 14th Amendment, it intervened in the states' criminal procedure. Once this was done a duty of care was assumed by the Court not to unnecessarily burden the reserved powers of the states, even if the burden is an indirect one flowing from a state court's misapplication of federally imposed standards. See *Long, supra* at; 103 S. Ct. at 3477, n.8. The same analysis which makes review of state court decisions excluding evidence under federal standards appropriate, militates in favor of the balancing of rights contained in a good faith exception i.e. those federal standards should not pose unreasonable obstacles to the states in the performance of their obligations. Accordingly, it is submitted that our Federal system, safeguarded by the 10th Amendment, mandates the institution of a good faith exception to the exclusionary rule.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeal should be reversed.

DATED: August 29, 1983

Respectfully submitted,

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SEP 12 1983

No. 82-1771

ALEXANDER L. STEWART,
CLERK

In the Supreme Court of the United States

October Term, 1983

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALBERTO ANTONIO LEON, ET AL.,
Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT**

**BRIEF OF AMICI CURIAE, THE STATE OF
KANSAS, THE STATE OF MISSOURI, THE
STATE OF SOUTH DAKOTA, THE STATE OF
WISCONSIN AND GULF & GREAT PLAINS
LEGAL FOUNDATION, IN SUPPORT
OF PETITIONER**

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September 9, 1983

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INTEREST OF AMICI CURIAE

Amici the State of Arkansas, the State of Kansas, the State of Missouri, the State of South Dakota, and the State of Wisconsin, as sovereign states, have a strong interest in the outcome of this case. In maintaining a rational and effective system of criminal justice, each state has a strong concern for protecting its citizens from criminal activity, as well as in seeing that the constitutional right of its citizens to be free of unreasonable searches and seizures is safeguarded.

Amicus Gulf & Great Plains Legal Foundation is a not-for-profit public interest legal foundation established in 1976. Its goals include the maintenance of a rational system of criminal justice, the preservation of the free enterprise system, and the protection of individual and constitutional rights. The Foundation has appeared as amicus curiae in a number of cases before this Court, including several cases relating to criminal and constitutional law.

No. 82-1711

In the Supreme Court of the United States

October Term, 1983

STATE OF COLORADO,
Petitioner,

vs.

FIDEL QUINTERO,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

BRIEF OF AMICI CURIAE, THE STATE OF
ARKANSAS, THE STATE OF KANSAS, THE
STATE OF MISSOURI, THE STATE OF SOUTH
DAKOTA, THE STATE OF WISCONSIN AND
GULF & GREAT PLAINS LEGAL FOUNDATION,
IN SUPPORT OF PETITIONER

SUMMARY OF ARGUMENT

The Court has granted certiorari in three cases—*Massachusetts v. Sheppard*, *Colorado v. Quintero*, and *U. S. v. Leon*—which all present the potential of creating a “good faith” exception to the exclusionary rule. Constitutional jurisprudence prior to *Mapp v. Ohio*, 367 U.S. 643 (1961), expressly negated any assumption that the exclusionary rule was mandated by the Fourth Amendment as applied to the states by the Fourteenth Amendment. The holding in *Mapp* that the exclusionary rule was constitutionally required by the Fourth Amendment was

agreed to only by four justices, and subsequent decisions of this Court have undermined any basis for the position that the exclusionary remedy is constitutionally required. The Court has refused to apply it in situations where it would have been applied had it been of constitutional dimension, and has refused to apply it retroactively, both of which are inconsistent with the notion that it is constitutionally mandated. Several justices have expressly stated that the exclusionary remedy is not of constitutional dimension, and this view is concurred in by the current President and a number of members of Congress.

Empirical research regarding the deterrent effect on the police of the exclusionary rule is inconclusive at best. However, the serious costs imposed by the exclusionary rule are virtually indisputable. Most serious among these are the freeing of dangerous criminals, the lack of proportionality between the violation and the remedy, and the consequent disrespect for the administration of justice which is engendered by the exclusionary rule.

Given the extreme complexity of Fourth Amendment search and seizure law, it is unrealistic to expect police officers to be able to apply it flawlessly under the difficult conditions in which they must work. Furthermore, the deterrence rationale for the exclusionary rule loses much of its force when good faith on the part of police officers is present. An exception to allow illegally seized evidence to be admitted would significantly improve the truth-seeking function of criminal trials, and diminish the degree to which the guilty go free. A more flexible test, in which factors such as the seriousness of the Fourth Amendment violation, the seriousness of the crime, and the centrality of the evidence in question could be considered, would provide a much-needed balance between the enforcement of the Fourth Amendment and the protection of society.

ARGUMENT

I. THE EXCLUSIONARY RULE IS A JUDICIALLY CREATED REMEDY ONLY, AND IS NOT CONSTITUTIONALLY MANDATED TO PROTECT FOURTH AMENDMENT RIGHTS.

Each of the three cases in which the Court has granted certiorari—*Massachusetts v. Sheppard*, *Colorado v. Quintero*, and *U. S. v. Leon*—presents in different form a similar issue: must evidence obtained contrary to the Fourth Amendment's protections against unreasonable searches and seizures automatically be excluded, or might an exception be made where the police officer acted reasonably and in good faith? Critical to the resolution of this issue is an examination of the constitutional and theoretical underpinnings of *Mapp v. Ohio*, 367 U.S. 643 (1961), the case which first imposed the exclusionary rule on the several states. *Mapp* purported to find a constitutional basis for the application of the exclusionary rule to the states. If the exclusionary rule is rooted in the Constitution, a considerably different question is presented than if the rule is merely one of practical expediency, which may be changed according to the lessons of experience. This brief will demonstrate that, in the light of constitutional jurisprudence before and after the *Mapp* decision, the attempt in *Mapp* to ground the exclusionary rule in the Fourth Amendment stands out as an anomaly. Logic and this Court's other decisions show that the exclusionary rule is only one means which may be used to ensure that the Fourth Amendment's guarantees will be respected, and is not itself constitutionally mandated. As such, it may be modified by the Court to bring it in harmony with the dictates of experience and the ends of justice.

Before analyzing *Mapp* and subsequent decisions, a brief review of the prior history of the exclusionary rule may be helpful.

For the first century of our nation's existence, neither this Court nor the other federal courts held that the suppression of improperly obtained evidence in criminal trials was either necessary or proper to implement the Fourth Amendment protections against unreasonable searches and seizures. The first intimation that such evidence might be suppressed under the Fourth Amendment came in *Boyd v. United States*, 116 U.S. 616 (1886). *Boyd* held that, in a federal proceeding, certain individuals could not be compelled by order of the court to produce private papers which would be incriminating to them. Though the Court discussed the Fourth Amendment at some length, the case appeared to be decided principally upon Fifth Amendment grounds, since no actual search or seizure had taken place. Nevertheless the case is significant as providing the first suggestion, halfway through the history of this country, that pertinent evidence might be withheld on Fourth Amendment grounds in a proceeding related to enforcement of criminal statutes.

It is significant that, eighteen years later, the Supreme Court in reviewing a criminal prosecution expressly reaffirmed the existing common law rule that a trial court has no justification under the Fourth Amendment for inquiring into the means by which evidence was obtained. *Adams v. New York*, 192 U.S. 585 (1904). *Adams* expressly distinguished *Boyd* as a Fifth Amendment case, and the authorities cited in *Adams* show that this refusal to suppress valid evidence was the uniform and prevailing rule.

Weeks v. United States, 232 U.S. 383 (1914), is widely regarded as the case which first applied the exclusionary

rule to federal agencies. In that case, the defendant's personal effects and papers had been seized by government agents without a warrant, and not pursuant to an arrest. The defendant filed a petition to have such property returned to him prior to the trial. The Supreme Court held that the refusal by the trial court to return all of such effects and papers violated the Fourth Amendment. The Supreme Court recognized the rule in *Adams* that the trial court should not inquire into the origin of evidence at trial, but held that the defendant had the right prior to trial to have his property returned to him. The practical effect, therefore, was to prevent the use of such evidence at trial.

The Fourth Amendment's guarantee against unreasonable searches and seizures was extended to the states through the Fourteenth Amendment only as recently as 1949. In the case which created that extension, *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court nevertheless expressly refused to impose a requirement on the states that the Fourth Amendment be implemented through the remedy of the exclusionary rule. The Court enumerated the common law and statutory protections then provided by the states to punish and deter Fourth Amendment violations, and to compensate victims of such violations, and concluded:

Indeed, the exclusion of evidence is a remedy which directly serves only to protect those upon whose person or premises something incriminating has been found. We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford. *Id.* at 31.

The Court held that the exclusionary remedy established in *Weeks* was a "matter of judicial implication" and was "not derived from the explicit requirements of the Fourth Amendment." *Id.* at 28. Noting that men "with a complete devotion to the right of privacy" might differ regarding the need for the exclusionary rule, and that most of the English-speaking world does not regard that remedy as vital to such protection, the Court decided that it must "hesitate to treat this remedy as an essential ingredient of the right." *Id.* at 28-29.

To the extent that *Wolf* refused to impose such a requirement on the states, it was overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961). Though the effect of *Mapp* was clearly to impose a requirement on the states that they employ the exclusionary rule, it is noteworthy that in *Mapp* only four Justices found that the exclusionary remedy itself was compelled by the Fourth Amendment. Justice Stewart concurred in the result without reaching "the merits of the constitutional issue which the Court today decides." *Id.* at 672. Justices Harlan, Frankfurter and Whittaker filed a strong dissent. Justice Black, concurring in result, stated that he was:

not persuaded that the Fourth Amendment standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. *Id.* at 661-662.

Justice Black based his concurrence on a joint interpretation of the Fourth and Fifth Amendments. *Id.* at 662. It is

significant that Justice Black had concurred in the *Wolf* decision, that his unique interpretation in *Mapp* failed to garner support in later decisions of the Court, and that in later decisions he made it clear that his concurrence in *Mapp* was based upon the Fifth Amendment, not the Fourth. As he stated in dissent in *Coolidge v. New Hampshire*, 403 U.S. 443, 496-97:

The Fourth Amendment prohibits unreasonable searches and seizures. The Amendment says nothing about consequences. It certainly nowhere provides for the exclusion of evidence as the remedy for violation. * * * The truth is that the source of the exclusionary rule simply cannot be found in the Fourth Amendment. That Amendment did not when adopted, and does not now, contain any constitutional rule barring the admission of illegally seized evidence.

See also, e.g., *Kaufman v. United States*, 394 U.S. 217, 237 (1969) (Black, J., dissenting); *Bumper v. North Carolina*, 391 U.S. 543, 560 (1968) (Black, J., dissenting); *Simmons v. United States*, 390 U.S. 377, 397 (1968) (Black, J., concurring and dissenting).

On several occasions since *Mapp*, the Court has drawn a distinction between the finding of a Fourth Amendment violation, and the appropriate remedy for that violation. Speaking for the Court, Justice Rehnquist recognized a distinction urged by the Government between "[w]hat is necessary to establish a . . . constitutional violation and what is necessary to support a suppression remedy once a violation has been established." *Scott v. United States*, 435 U.S. 128, 135 (1978). The Court has indicated that the exclusionary rule is only a "judicially created remedy" rather than a "personal constitutional right." *Stone v. Powell*, 428 U.S. 465, 482 (1976); *United States v. Calandra*, 414 U.S. 338, 348 (1974). If the exclusionary rule were

part and parcel of the Fourth Amendment, and created a personal constitutional right in every person who was the victim of an illegal search or seizure, then the fruits of the search or seizure should not be able to be used against him in any type of proceeding. But the Court has almost uniformly refused to extend the exclusionary rule to situations other than criminal trials. *See, e.g., Stone v. Powell*, 428 U.S. 465, 482 (1976) (habeas corpus proceedings); *United States v. Janis*, 428 U.S. 433, 454 (1976) (civil suit by government); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (grand jury proceedings).

Even in a criminal trial, the remedy of exclusion is not absolute. *United States v. Havens*, 446 U.S. 620 (1980) (impeachment of statements made by defendant on cross-examination); *United States v. Ceccolini*, 435 U.S. 268 (1978) (voluntary testimony by live witnesses). In several major cases, the Court has also declined to give retroactive effect to the exclusionary rule when decisions of the Court have extended the reach of Fourth Amendment protections. *Williams v. United States*, 401 U.S. 646 (1971); *Desist v. United States*, 394 U.S. 244 (1969); *Linkletter v. Walker*, 381 U.S. 618 (1965). None of the holdings of these cases is consistent with the theory that the exclusionary rule is of constitutional dimension.

If the exclusionary rule were of constitutional dimension, it would certainly be beyond the power of Congress to change it. However, as long ago as 1971, the Chief Justice called upon Congress to pass a statute providing, *inter alia*, "that no evidence, otherwise admissible, shall be excluded from any criminal proceeding because of violation of the Fourth Amendment." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 423 (1971) (Burger, C.J., dissenting). In *Wolf*, 338 U.S. at 33, Mr. Justice Frankfurter expressly

recognized that a "different question" would be presented if Congress were to pass a statute purporting to negate the *Weeks* doctrine as it respects federal agencies, or if Congress attempted to make the exclusionary rule binding upon the states by statute. In the same case, Mr. Justice Black, concurring, stated that he felt it to be the "plain implication" of the Court's opinion that the exclusionary rule is "not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." *Id.* at 39-40.

The President and at least certain members of Congress are of the same view. On March 18, 1982, Senators Thurmond and DeConcini introduced on behalf of the Administration a bill to provide a good faith exception to the exclusionary rule. 128 Cong. Rec. S2417 (daily ed. March 18, 1982). On September 13, 1982, the Criminal Justice Reform Act of 1982 was introduced in the Senate on behalf of the Administration. Among other things, it also contained a statutory good faith exception. 128 Cong. Rec. S11338 (daily ed. Sept. 13, 1982). The message by President Reagan accompanying that bill noted that although "the argument for retaining the exclusionary rule in any form is, at best, tenuous" the bill would at least eliminate application of the rule "in those cases in which it most clearly has no deterrent effect." *Id.* Though this Court is, of course, the final arbiter of whether the exclusionary rule is constitutionally based, the rule announced in *Mapp* that it is constitutionally required appears to have received as little credence in the executive and legislative branches as it has implicitly received in the later decisions of the Court.

In summary, the exclusionary rule is a rather late development in Fourth Amendment jurisprudence, and the leading case, *Mapp v. Ohio*, contained no clear or persuasive

constitutional mandate for the remedy of exclusion. Subsequent court opinions have emphasized that the exclusionary rule does not create a personal constitutional right, but is instead merely a judicially created remedy. The Court has, for the most part, declined to extend that remedy into areas other than the direct admission of evidence in criminal prosecutions. The reasonable inference is that the exclusionary rule, having been created by the Court as a prudential remedy, can also be changed by this Court if the remedy is seen not to have achieved its main purpose, or is seen to have created other undesirable effects. We therefore turn to a discussion of the purposes underlying the rule, and the severe, negative consequences which it has created.

II. THE EXCLUSIONARY RULE DOES NOT ACCOMPLISH THE MAIN PURPOSES FOR WHICH IT WAS IMPLEMENTED, BUT INSTEAD LEADS TO MAJOR DYSFUNCTIONS IN THE CRIMINAL JUSTICE SYSTEM.

It is now well recognized that the overriding purpose of the exclusionary rule, if not its sole purpose, is the deterrence of illegal searches and seizures by police. In *Mapp v. Ohio*, 367 U.S. 643 (1961), Justice Clark stated that the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 656 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)). References have also been made to a supposed purpose of preserving "judicial integrity"—that is, preventing the judicial process from becoming sullied by the use of unconstitutionally obtained evidence. See discussion in *United States v. Peltier*, 422 U.S. 531, 536-39 (1975). However, most decisions have made it clear that the practical rationale for the exclusionary rule is

deterrence, and that the rule must survive or fall on that basis. See, e.g., *United States v. Janis*, 428 U.S. 433, 446-54 (1976).

Though a number of empirical studies have been performed to determine whether the exclusionary rule does in fact deter illegal conduct, the results have been inconclusive. One of the more comprehensive empirical studies examined statistics and other facts relating to Motions to Suppress in the city of Chicago over a twenty-year period. J. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. Legal Stud. 243 (1973). The study covered the years 1950-1970, a period almost evenly divided between the pre-Mapp and post-Mapp years. The author questioned whether the exclusionary rule in fact had any deterrent effect on police officers, noting that "[t]he individual police officer who is involved in a Motion to Suppress often leaves the courtroom confused rather than clarified as to what his proper conduct should be." *Id.* at 276. Perhaps the most thoroughgoing of such studies is D. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665 (1970). This study reviewed most of the empirical data which had previously been published on this subject, together with certain new data. The author concluded that the data provided "little support for the proposition that the exclusionary rule discourages illegal searches and seizures" *Id.* at 667. The article closes with a call for the abolition of the exclusionary rule. *Id.* at 754.

In this respect, little has changed in the thirty-five years since *Wolf* was decided. In 1954, Mr. Justice Jackson stated: "What actual experience teaches we really do not know." *Irvine v. California*, 347 U.S. 128, 135 (1954). One year prior to the *Mapp* decision, Mr. Justice Stewart ad-

mitted that "empirical statistics are not available" to show that the exclusionary rule deters unlawful searches and seizures. *Elkins v. United States*, 364 U.S. 206, 218 (1960). After reviewing the literature, Mr. Justice Blackmun, writing for the Court, more recently expressed serious doubts about the empirical underpinnings of the rule. *United States v. Janis*, 428 U.S. 433, 446-54 (1976).

On the other hand, it has become increasingly clear that the exclusionary rule has a number of severe adverse consequences. One leading commentator on the exclusionary rule, Judge Malcolm R. Wilkey of the Court of Appeals for the District of Columbia, has identified no fewer than twelve separate costs of the exclusionary rule. Judge Wilkey's list is as follows:

1. "The criminal is to go free because the constable has blundered."
2. Only the undeniably guilty benefit from the exclusionary rule, while innocent victims of illegal searches have neither protection nor remedy.
3. The exclusionary rule in any form vitiates all internal disciplinary efforts by law enforcement agencies.
4. The disposition of exclusionary rule issues constitutes an unnecessary and intolerable burden on the court system.
5. The exclusionary rule forces the Judiciary to perform the Executive's job of disciplining its employees.
6. The misplaced burden on the Judiciary deprives innocent defendants of due process.
7. The exclusionary rule encourages perjury by the police.
8. The exclusionary remedy makes hypocrites out of judges.

9. The high cost of applying the exclusionary rule causes the courts to expand the scope of search and seizure for all citizens.

10. The exclusionary rule is applied with no sense of proportion to the crime of the accused.

11. The exclusionary remedy is applied with no sense of proportion to the misconduct of the officer.

12. All of the above costs result inevitably in greatly diminished respect for the judicial process, lawyers and laymen alike.

See M. Wilkey, *Enforcing the Fourth Amendment by Alternatives to the Exclusionary Rule* (National Legal Center for the Public Interest, 1982) [reprinted at 95 F.R.D. 211 (1982)]; M. Wilkey, *Constitutional Alternatives to the Exclusionary Rule*, 23 S. Tex. L. J. 531 (1982).

The Court itself has identified five major costs of the exclusionary rule in *Stone v. Powell*, 428 U.S. 465, 489-91 (1976). The Court considered the following five costs to be "well known":

1. "[T]he focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding."

2. "[T]he physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."

3. Application of the rule "deflects the truth finding process and often frees the guilty."

4. "The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is

contrary to the idea of proportionality that is essential to the concept of justice."

5. Because of these costs, the rule may have the "effect of generating disrespect for the law and administration of justice."

All of these costs identified by the Court and Judge Wilkey are significant. However, perhaps three costs are the most significant:

1. By suppressing reliable and oftentimes essential evidence, the rule allows guilty and dangerous criminals to go free;

2. By suppressing evidence regardless of the seriousness of the violation of Fourth Amendment rights, or the seriousness of the crime, the rule is contrary to the idea of proportionality that is essential to the concept of justice; and

3. By freeing dangerous criminals without regard to guilt, and diverting the inquiry at trial to technicalities, the rule generates disrespect for the law and the administration of justice.

The effect of a good faith exception or similar exception upon these costs will be discussed in Part III.

III. A GOOD FAITH EXCEPTION, OR BROADER EXCEPTION TAILORED TO PRACTICAL NEEDS AND THE NEED FOR A FAIR TRIAL, WOULD SUBSTANTIALLY REDUCE SOME OF THE MOST IMPORTANT COSTS OF THE EXCLUSIONARY RULE.

Of all of the many costs of the exclusionary rule, perhaps the single most serious is the societal cost of permitting unquestionably guilty criminals to go free on the

basis of abstruse technicalities. The literal impossibility of expecting police officers to interpret perfectly the arcane rules of search and seizure was vividly described in the message from the Assistant Attorney General which accompanied S. 2231, the bill to establish a good faith exception. That message mentioned the decision in *Robbins v. California*, 453 U.S. 420 (1981), and went on to state:

In *Robbins*, the Court excluded evidence of a substantial quantity of marihuana found in a car trunk in a decision based largely on two previous cases, *United States v. Chadwick*, 433 U.S. 1 (1977), and *Arkansas v. Sanders*, 442 U.S. 753 (1979), neither of which had been decided at the time of the search in *Robbins* in 1975. The *Robbins* decision overruled previous decisions of the trial and appellate courts in California that the search was valid. When finally decided, 14 judges had reviewed the search; seven found it valid; seven invalid. To add to the confusion, less than three months after it decided *Robbins*, the Supreme Court granted certiorari in *United States v. Ross*, 102 S. Ct. 386 (1981) and asked both sides to address the question of whether *Robbins* should be reconsidered. It is unrealistic to think that the exclusionary rule can motivate even the most conscientious law enforcement officer to apply flawlessly the teaching of a body of law that the courts are still developing and debating, especially when the examination to test his knowledge is suddenly presented in a potential life or death situation. 128 Cong. Rec. S2417 (daily ed. March 18, 1982).

Given the inevitable complexity of Fourth Amendment search and seizure law, police officers must be given some degree of latitude in applying it. Justice White has forcefully argued for a "good faith" exception in his dissent in *Stone v. Powell*, 428 U.S. 465, 536 (1976). The Court

has also recognized that deterrence fails as a rationale when good faith is present:

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. *Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. Michigan v. Tucker, 417 U.S. 433, 447 (1974). [emphasis added]*

An exception to the exclusionary rule which would allow evidence obtained in violation of the Fourth Amendment to be used at trial, when the officer's actions were performed reasonably and in good faith, would significantly improve the truth-seeking process in those areas where the law is unclear, or is subsequently changed. By doing so, it would substantially mitigate the serious cost of allowing criminals to go free, and thereby minimize the disrespect for the criminal process which this tangle of technicalities has produced.

The societal costs of the exclusionary rule are not of course limited to the actual victimization and increased crime caused by the freeing of criminals. Disrespect for the courts results when the public perceives that there is only an attenuated relationship between guilt and conviction. Survey data bear this out. In April of 1965, when the effects of the Supreme Court's constitutional reforms of criminal procedure were just beginning to be felt, only 48% of the American public believed that the courts did not deal harshly enough with criminals. Gallup Opinion

Index Rep., No. 33 (1968). By February of 1968 that figure had risen to 63%, and by March of 1969 had increased to 75%. Gallup Opinion Index Rep., No. 33 (1968); Gallup Opinion Index Rep., No. 45 (1969). According to figures cited by Attorney General William French Smith, the percentage of the public which felt that the courts do not deal harshly enough with criminals had reached 90% by 1981. Comment, 23 S. Tex. L. Rev. 693, 700, n. 57 (1982). Though the exclusionary rule is certainly not entirely responsible for this perception of undue judicial leniency, it cannot have failed to have contributed to it.

At present, the determination of a Fourth Amendment violation on a Motion to Suppress is automatically tied to the exclusionary remedy. If a violation is found, the evidence is suppressed. Creating a good faith exception would divorce the issues of (1) finding a violation, and (2) deciding whether the evidence should be admitted. Since a two-step process will therefore be necessary, amici would suggest that any exception created by this Court might well address more than the reasonableness and good faith of the officer's conduct. Specifically, a more flexible exception would allow the trial court to consider other factors which will bring some proportionality to decision-making in this area. For example, assuming a Fourth Amendment violation has been found, the trial court should be able to consider factors such as the following in deciding whether the evidence should be suppressed:

1. Despite the existence of a Fourth Amendment violation, was the action of the officer nevertheless taken reasonably and in good faith?

2. How central is the evidence in question to determining guilt or innocence?

3. How serious was the invasion of the defendant's Fourth Amendment rights?

4. How serious was the crime, and, if the charge were to be proven, how dangerous is the alleged offender likely to be to society?

There are many types of evidentiary determinations in which the trial court must weigh the probativeness and value of the evidence against extrinsic policy concerns. Amici suggest that if the exclusionary rule is to be retained, it would be much more salutary to create a similar rule in cases of alleged Fourth Amendment violations, so that the critical interests of protecting society can be weighed against the deterrence which the exclusionary rule seeks to advance.

It is perhaps not necessary for this Court to determine the exact content of such a test which could be applied by state courts. If the exclusionary rule is not constitutionally mandated, this Court is certainly empowered to formulate a remedy for the federal courts under its general supervisory powers. But, if the rule is not of constitutional dimension, it is difficult to ascertain what would authorize this Court to develop a detailed rule for state courts. The Court is obviously empowered to ensure that the states enforce the strictures of the Fourth Amendment, as applied to the states through the Fourteenth. Nevertheless, there is certainly a great deal of room for experimentation and differences in judgment as to the contours of the remedy or remedies to be implemented. Thus, if the exclusionary rule is to be retained as applied to the states, amici would urge the Court to do no more than establish general guidelines for the states to observe in establishing a good faith exception, or in establishing a more flexible exception which would diminish the present costs of the exclusionary rule.

CONCLUSION

For the reasons stated above, the decision of the lower court should be reversed, and the case remanded for further proceedings.

Respectfully submitted,

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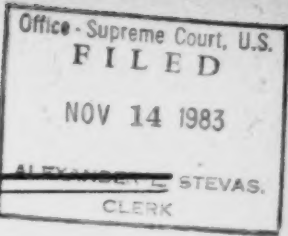
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No. 82-1771

IN THE
Supreme Court of the United States
October Term 1983

UNITED STATES OF AMERICA,
Petitioner,

vs.

ALBERTO ANTONIO LEON, et al.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF THE MINNESOTA
STATE BAR ASSOCIATION**

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**BRIEF AMICUS CURIAE OF THE MINNESOTA
STATE BAR ASSOCIATION**

INTEREST OF THE AMICUS CURIAE

The Minnesota State Bar Association is a voluntary organization of the legal profession in Minnesota. Its approximately 10,000 members include prosecutors, public defenders, private lawyers, trial and appellate judges in both the state and federal systems, legislators, law enforcement and corrections personnel, law students, and even an occasional law professor. The Minnesota State Bar Association has had the improvement of the administration of justice as a primary purpose during its century of existence.

At an annual meeting in 1981, the members of the Minnesota State Bar Association voted to oppose any effort to dilute the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961). Viewing the government's proposal for a "good faith/reasonable mistake" exception in *United States v. Leon* and other cases involving search and seizures without probable cause as an attempt to abrogate the paramount prohibition of the Fourth Amendment, the Minnesota State Bar Association reaffirmed its position and sought consent to intervene in the instant case.

The legal profession works for and, by its vigilance, protects nothing more precious than constitutional rights. At stake in the instant case, and in the government's attempt to engraft a "good faith/reasonable mistake" exception onto the Fourth Amendment, is our security against arbitrary government invasion—search and seizure without probable cause.

Crime, and particularly trade in narcotics, is a major concern throughout the nation. The membership of the Minnesota State Bar Association shares the concern and supports consistent and conscientious attempts to apprehend and convict individuals violating the law; but it does not support attempts to accomplish apprehension or conviction at the cost of rights drafted by the Framers of the Constitution and secured by the sacrifice of generations of Americans. The probable cause barrier that has existed between the government's desire to see and take, and the citizen's desire to hide and retain is among our most cherished rights, defining a unique relationship between the government and the citizen—freedom. It is that freedom that is the interest of the Amicus Curiae, Minnesota State Bar Association.

SUMMARY OF ARGUMENT

The "good faith/reasonable mistake" exception is not, as the government claims, an exception to the exclusionary rule of evidence; it is an exception to the explicit probable cause standard of the Fourth Amendment.

The Fourth Amendment defines the relationship between the government and the citizen, at least to the extent that it prohibits the former from search and seizure of the latter without probable cause.

If the government asks the Court to create an exception that will ignore probable cause in favor of what "a reasonably well-trained officer should have known," in order to "accommodate the practical realities of police work," it is disingenuous to argue that its proposal goes only to a remedy and that the considerations are non-constitutional.

The government argument for a "good faith/reasonable mistake" exception depends upon the faulty premise that deterrence is the only rationale for the exclusionary rule. The precedents do not support the conclusion. They deal with derivative use, such as grand juries, and derivative evidence—"the fruit of the poisonous tree." The exclusive focus on deterrence in those cases is permissible only because vindication of the personal right to privacy is accomplished by exclusion of the government's illegally obtained evidence at the criminal trial. In derivative use cases the deterrence rationale requires the Court to employ its own cost-benefit analysis. When the rationale for exclusion is the vindication of the personal constitutional right to privacy, the Court is obliged to apply the exclusionary remedy in conformity with the Framers' original constitutional cost-benefit judgment.

If the government attempts to incarcerate a citizen by introducing, at a criminal trial, evidence it has discovered and taken from the citizen without probable cause, only the exclusion of that evidence will restore to the citizen that personal right to a protected position against the government that is guaranteed by the Fourth Amendment. No other remedy can vindicate the personal right. None of the arguments made against exclusion are applicable when the probable cause standard of the Fourth Amendment is at stake.

ARGUMENT

I.

THE "GOOD FAITH/REASONABLE MISTAKE" EXCEPTION IS NOT AN EXCEPTION TO THE EXCLUSIONARY RULE OF EVIDENCE; IT IS AN EXCEPTION TO THE EXPLICIT PROBABLE CAUSE STANDARD OF THE FOURTH AMENDMENT.

Whatever may be the case when a warrant is improperly completed or when a probable cause search is conducted without a warrant; in this case, and in *Colorado v. Quintero*, No. 82-1711, the government's contention for a "good faith/reasonable mistake" exception asks the Court to amend the language of the Fourth Amendment to provide:

The right of the people to be secure . . . against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause *or a little bit less if the government's failure to meet the standard is not the result of mean spirit. . . .*
(Amending language italicized.)

The government frames the issue in terms of an exclusionary rule that it claims is non-constitutional, and argues

from a deterrence rationale that it claims cannot be furthered when a government official's mistake is "reasonable" or in "good faith." It suggests that the Court has the policy discretion attendant "a judge-made rule of evidence" and that it is not burdened by the mandate that attaches to the enforcement of a constitutional right. The issue is wrong; the analysis is irrelevant; and the conclusion is erroneous.

Because the government fails to properly assess the scope of *United States v. Calandra*, 414 U.S. 338 (1974) and similar cases, it argues for a "good faith/reasonable mistake" exception to the probable cause standard by pressing a deterrence remedy analysis. When the search or seizure violates the Fourth Amendment for failure of probable cause, the questions are of rights and restoration, not of remedies and deterrence. If the government is to prevail in application of a "good faith/reasonable mistake" exception when probable cause is at stake, the exception must fit within the analytic framework of the right and its foundation, not within an analysis that speaks only to the remedy and its rationale.

The Fourth Amendment defines the relationship between the government and the citizen, at least to the extent that it prohibits the former from search and seizure of the latter without probable cause. It is not limited to police officers; it prohibits the entire government. It does not depend upon cost-benefit analysis, it is enforced because it is in the constitution:

The basic purpose for the Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. (*Camara v. Municipal Court*, 387 U.S. 523 at 528 (1967)).

The line between "arbitrary invasions by government officials" and permitted search and seizure is marked by probable cause. "Probable cause," said Justice White, "is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." (*Id.* at 534).

Although the government purports to attack a non-constitutional exclusionary rule with its "good faith/reasonable mistake" exception, its arguments do not relate specifically to the exclusionary rule, but to the existence of any remedy. Indeed, the government makes a single argument for cases in which there is a failure of probable cause, whether or not there is a warrant.

Application of the exclusionary rule in (*Quintero*) is thus ineffective, because of the greatly diminished potential for deterrence when the police conduct themselves in a manner they believe to be lawful. . . .

. . . *Leon* demonstrates that the purpose (to deter police misconduct) cannot be advanced when law enforcement officers have done exactly what is demanded of them by obtaining a judicial search warrant and acting according to its terms. (Brief of the United States, hereinafter "Govt. Brief," 21).

The "good faith" name for the proposed exception and the deterrence argument, upon which the government relies, suggest that if an officer actually believes his conduct conforms with the Fourth Amendment, the officer cannot be deterred. Having used the officer's actual belief to "prove" the appropriateness of deterrence analysis for exclusionary rule issues, the government then abandons what the officer thinks and embraces an "objective" standard that is blind to what the particular officer actually thinks.

The result, of course, is to change "probable cause" from a legal standard determined and reviewed by judges, to an ad hoc standard determined by the law enforcement version of the "reasonable person." Indeed, the government admits as much:

Moreover, the objective nature of the inquiry will protect the judicial system against unduly burdensome and generally irrelevant inquiries into the subjective state of mind . . . a court will need to determine only *whether a reasonably well-trained officer should have known*, in light of the extant principles of law, that this conduct was prohibited. (Govt. Brief 25) (Emphasis added).

It goes so far as to suggest that the courts should ignore the probable cause requirement unless it is predictable.

. . . society has little interest in 'detering' the police from solving or preventing crime under circumstances in which the Fourth Amendment violation, if any, could not reasonably have been predicted. (Govt. Brief 21).

The government pushes the point to the extent that it suggests that the court should restrike the line between arbitrary invasion and permitted search because probable cause may be too tough a standard.

But the facts in . . . *Quintero* well illustrate (a situation) in which the exclusionary rule should be modified to *accommodate the practical realities of police work*. (Govt. Brief 48) (Emphasis added).

If the government asks the Court to create an exception that will ignore probable cause in favor of what "a reasonably well-trained officer should have known," in order to

"accommodate the practical realities of police work," it is disingenuous to argue that its proposal goes only to a remedy and that the considerations are non-constitutional. The right to be secure against searches without probable cause is being altered, and the Court cannot do that without an analysis that speaks to the right.

Retired Justice Potter Stewart made the point in a recent article, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 Colum. L. Rev. 1365 (1983). In response to those who criticize the exclusionary rule for freeing those who might be guilty of crime, he distinguishes the situation in which there is no probable cause, pointing to the Amendment:

(I)n many of the cases in which exclusion is ordered, police officers would not have discovered the evidence at all if they had originally complied with the fourth amendment. *Where that is the case, the "culprit," if blame for the dismissal is to be assessed, is the fourth amendment to the Constitution, not the exclusionary rule.* The drafters of the fourth amendment determined that government agents would be deprived of the power to engage in certain investigative activities because those activities threaten the personal security of all men and women. A necessary implication of that limitation is that fewer criminals will be apprehended. (*Id* at 1394) (Emphasis added).

The lynchpin of the government argument is that "the only viable justification for the exclusionary rule is its presumed deterrent effect on unlawful police conduct." (Govt. Brief 31). It is the assumption that only deterrence justifies the rule that allows the government to argue that the Court is in a position to do a cost-benefit analysis—an analysis

which, if the issue is constitutional, is beyond the Court's power. The government then spends the majority of its effort in persuading the Court that a reasonable mistake is undeterrable, or if deterrable, not worth the candle.

The argument depends upon the faulty premise that deterrence is the only rationale for the exclusionary rule.

The rise to preeminence of the exclusionary rule's deterrent purpose reflects abandonment of earlier justifications. Initially, the rule was justified as a remedy for the violation of an accused's personal Fourth Amendment right of privacy. *Weeks*, 232 U.S. at 398. *This rationale has since been repeatedly and squarely rejected by the Court.* (e.g. *Calandra*, 414 U.S. at 347; *Linkletter v. Walker*, 381 U.S. 618, 637 (1965). (Govt. Brief 33) (Emphasis added).

On close examination, neither *Calandra* nor *Linkletter*—the only cases cited by the government—support its position.

Linkletter v. Walker, 381 U.S. 618 (1965), dealt with retroactivity, a question that assumed the constitutional nature of the rule about which the retroactivity issue was raised. Justice Clark, the author of *Mapp v. Ohio*, 367 U.S. 643 (1961), raised no objection from any member of the Court, including the *Linkletter* dissenters, when he said that the *Mapp* Court “affirmatively found that the exclusionary rule was ‘an essential part of both the Fourth and Fourteenth Amendments.’” (381 U.S. at 634) Far from “squarely reject(ing)” *Weeks*, and *Mapp*, for that matter, *Linkletter* reaffirms them. *United States v. Johnson*, 457 U.S. 537 (1982), a later retroactivity case concerned with the Fourth Amendment precedent, and explaining *Linkletter*, specifically rejects any “good faith/reasonable

mistake" exception to the retroactive application of Fourth Amendment exclusionary rules. (*Id.* at 559)

Calandra, the other case cited by the government, is indeed based on deterrence, but only because it is a derivative use case. "[D]erivative use," said Justice Powell, "presents a question not of rights, but of remedies." (*Id.* at 354) It was derivative use that allowed him to concentrate solely on deterrence and hold that the exclusionary rule—not the Fourth Amendment—should not operate to bar grand jury questions based upon illegally obtained evidence. One need not accept Justice Powell's resolution of the deterrence question to agree that deterrence is the proper analytic approach to derivative use questions. In addition to the holding, concerning grand jury questions, the major dictum in the case—that the exclusionary rule would not bar grand jury use of the illegally obtained evidence, itself—depended upon the nature of the grand jury as a charging mechanism. Justice Powell was careful to specifically except the question of suppression at the criminal trial from the opinion. (*Id.* at 348) It was on the basis of that exception that he could limit the opinion to exclusionary issues that turned on deterrence "rather than a personal constitutional right of the party aggrieved." (*Id.*) The consequent certainty that the defendant's rights would be vindicated by exclusion at the criminal trial, allowed his dictum that the direct fruits of the illegal search could be used when only charging was at issue. (*Id.* at 354 n.10.)

Calandra does not "squarely reject" the proposition that the exclusionary rule may be "justified as a remedy for the violation of an accused's personal Fourth Amendment right of privacy." Quite the contrary, it depends on the vindication of the personal right rational for the rule at the crim-

inal trial to permit the exclusive concentration on the deterrence rationale for derivative use situations.

The government fails to distinguish between cases involving vindication of the personal right and those involving deterrence when it suggests that the Court always "employs a cost-benefit analysis whenever it considers whether the rule should be applied to particular situations." (Govt. Brief 19) (citing, e.g., *United States v. Havens*, 446 U.S. 620 (1980); *United States v. Ceccolini*, 435 U.S. 268 (1978); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *Calandra*, 414 U.S. 338; *Alderman v. United States*, 394 U.S. 165 (1969)).

United States v. Havens, 446 U.S. 260 (1980) is a case involving waiver of rights by the decision to be a witness. It does not demonstrate that cost-benefit analysis is always employed in exclusionary rule cases. The government was not allowed to offer the illegally obtained evidence in its case in chief against Havens. His personal constitutional right to keep property from the possession and use of the government when the latter has no probable cause required the exclusion. When, however, the defendant chose to change the relationship between himself and the government as an adversary, and chose to testify—and to lie—he waived the protection that the Constitution provided to him personally. The case involves an application of the fundamental rule that a testifying defendant waives many trial vindicated constitutional rights that could have been preserved by exercising the right not to participate as a witness, as well as serving as an example of the "personal constitutional right" to exclusion which only the defendant can waive.

United States v. Ceccolini, 435 U.S. 269 (1978) involved a "fruit of the poisonous tree" derivative evidence prob-

lem—deterrence was the issue. *Stone v. Powell*, 428 U.S. 456 (1976) was a habeas corpus case in which the holding assumed a “full and fair” hearing before state courts with an obligation equal to the Federal courts’ to enforce the Fourth Amendment by the exclusion of evidence at criminal trials. *United States v. Janis*, 428 U.S. 433 (1976) involved federal civil use of evidence illegally obtained by state officers—deterrence was the issue, and at two levels. *Alderman v. United States*, 394 U.S. 165 (1969) refused to extend the rule to defendants whose Fourth Amendment rights were not violated—deterrence was the issue—and did so on the explicit premise that only a defendant asserting a personal right could constitutionally insist upon exclusion:

We adhere to these cases and to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.

The Court employs its own cost-benefit analysis only in those circumstances in which deterrence is the sole basis for exclusion. When the rationale is vindication of the personal constitutional right, the Court is obliged to apply the exclusionary remedy in conformity with the Framers’ cost-benefit analysis.

The Court’s obligation to enforce the probable cause standard is inconsistent with a “good faith/reasonable mistake” exception. The government’s assertion that “the costs of the exclusionary rule outweigh its benefits” when the well-trained officer conducts a search without probable cause, either with or without a warrant, (Govt. Brief 38, 57) is simply a request that the Court substitute its judg-

ment for that of the Framers. The probable cause standard is the result of a constitutional cost-benefit analysis that the Court may not alter, no matter its belief about how badly the Framers weighed the costs and benefits in making their judgment. The Chief Justice has spoken eloquently to the point in the context of a legislative judgment that preferred the snail darter to the Tellico Dam. He required the courts to exercise their remedial power to give meaning to the legislative act, even though the substance of the act may have flown in the face of the Court's common sense. His explanation, transferred from legislative to constitutional judgment, articulates the limitation on the Court's ability to alter a constitutional judgment to which it believes "good faith" should be an exception.

Once (the Constitution) . . . has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought.

Here we are urged to . . . shape a remedy 'that accords with some modicum of common sense and the public weal.' But is that our function? (W)e have (no) mandate from the people to strike a balance of equities. . . (The Constitution) has spoke in the plainest of words, making it abundantly clear that the balance has been struck in favor of (probable cause) . . .

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the (Framers) is to be put aside in the process of interpreting (the Constitution). (*TVA v. Hill*, 437 U.S. 153 at 1974 (1977)).

The Court's opinions in Fourth Amendment cases have consistently reflected the Chief Justice's view of the Court's obligation to enforce legislative or constitutional mandate.

Despite the "disagreement among Justices as to the extent to which the (Warrant) Clause defines the reasonableness standard of the Amendment," noted by Justice Powell in *Texas v. Brown*, No. 81-419, 33 CrL 3001 at 3005 (1982), there has never been disagreement about the inflexibility of the probable cause requirement for searches and seizures in a criminal case. To be sure, Justice Stevens, dissenting in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1977), chastised the majority for suggesting that the probable cause requirement might be relaxed in a non-criminal context based upon the Court's belief that the governmental need to conduct a category of searches outweighed the intrusion on Fourth Amendment interests.

The Court's approach disregards the plain language of the Warrant Clause and is unfaithful to the balance struck by the Framers of the Fourth Amendment. . . . (Id. at 327)

Justice White, whose opinion identified different components to probable cause in a civil matter, has himself, been vigorously protective of the probable cause standard in the criminal context. In his *Camara* opinion, the forerunner of *Marshall*, Justice White went to great length to separate the criminal from the non-criminal before suggesting that probable cause was ever a flexible concept. He was unrelenting in his assertion that, in the criminal context, probable cause was a prerequisite to a search, even for contraband.

In cases which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. . . . For example, in a criminal investigation,

the police may undertake to recover specific stolen or contraband goods. . . . a search for these goods, even with a warrant is 'reasonable' only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling. (Camara v. Municipal Court, 387 U.S. at 534, 535) (Emphasis added).

Only the Court can guard the Constitution when the executive attacks it.

II.

EXCLUSION IS THE CONSTITUTIONALLY REQUIRED REMEDY WHEN THE GOVERNMENT'S EVIDENCE IS THE RESULT OF A SEARCH WITHOUT PROBABLE CAUSE. BECAUSE THE REMEDY IS TO RESTORE A PERSONAL RIGHT, THE "GOOD FAITH" OF THE GOVERNMENT IS IRRELEVANT.

If the government attempts to incarcerate a citizen by introducing, at a criminal trial, evidence it has discovered and taken from the citizen without probable cause, only the exclusion of that evidence will restore to the citizen that personal right to a protected position against the government that is guaranteed by the Fourth Amendment. The government's argument against exclusion is based upon the officer's "good faith," and the inability of the exclusionary remedy to deter a subsequent "good faith" mistake. The argument proves too much, and in doing so demonstrates that deterrence is irrelevant to the inquiry.

If it is true that the exclusion of evidence at trial would be unfair to an officer or to a magistrate whose search or authorization to search without probable cause was the result of a failure to accurately predict the law, any action

against the individual officer or magistrate would be even worse. A tort remedy would do nothing to guarantee to the citizen the benefit of the relationship with the government proclaimed by the Fourth Amendment, and would penalize a law enforcement officer who was acting diligently. The same is true of any administrative proceeding, except that it would do nothing for the citizen and only punish the "innocent" officer. The government's deterrence argument, if correct, prohibits any remedy if the government activity is without mean spirit.

The premise, of course, is wrong. The Fourth Amendment is not a prohibition against a government with bad motives; it prohibits a government with too little evidence. The "remedial objectives" that need, in Justice Powell's terms, to be "efficaciously served," relate to the loss of protection for the citizen on trial, not to some future conduct of some unknown officer. It may be that a continuous course of remedy against prohibited action will assist in shaping future conduct—our criminal law is based upon the assumption—but that is not the only objective of remedies. In the instant case, or in any other where probable cause does not exist, an injunction would surely issue to prohibit the search, the seizure, or the continued government possession if the individual citizen could know about the application for warrant and reach a judge beforehand. If the citizen lost, the matter would surely be appealable. Even *Wolf v. Colorado*, 338 U.S. 25 (1949) recognized that the Fourth Amendment was not merely hortatory, and that it provided the basis for a legal remedy of some kind. If the citizen could bring the matter before a judge, only the level of evidence would matter. The existence of probable cause—that barrier to government action—would be

the only issue. The character of the citizen and the motives of the officer would be irrelevant. The government concedes as much.

Just last term in *Illinois v. Gates*, No. 81-430 (June 8, 1983) the Court reiterated that the issue of probable cause was properly one for judicial determination and review. Such determination and review must exist so that the court can settle cases and controversies between parties with something at stake.

What the citizen has at stake is the right to be secure against arbitrary action against the citizen calculated to alter the relationship between the citizen and his or her government. No tort remedy nor administrative proceeding against the officer can restore the relationship between the citizen and the government that existed before the government's arbitrary action. Exclusion of the evidence that the government would not have, if it had not acted arbitrarily, would come close to fully restoring the citizen and the government to the *status quo ante*. Although the indignity of the search, if any there be, cannot be undone, exclusion prohibits the government as adversary from changing its relationship with the citizen. Ultimately, it is the guarantee of the relationship that the Fourth Amendment protects; and it is that guarantee that the citizen has at stake.

The Amendment contemplates an adversarial relationship between the citizen and the government, one in which the citizen has something that he or she does not want the government to know about, have, or use against the citizen. It guarantees that the government will not change that relationship, and gain advantage over the citizen, without first having probable cause. In a criminal trial, with direct use of the illegally seized evidence, the Fourth Amendment relationship between the citizen and government is altered

by the introduction of the evidence. The *Weeks* Court recognized that use was as much a violation of the Amendment as the seizure when it observed:

If (property) can thus be seized and held and *used* in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. (232 U.S. at 393) (Emphasis added).

The government makes no arguments in favor of the "good faith/reasonable mistake" exception that meet the objection that the result of the application is approval of searches without probable cause.

The contention that exclusion "allows '[t]he criminal . . . to go free because the constable has blundered.'" (Govt. Brief 22, 23) suggests that the government has lost something because of the ineptitude of its agents. Unlike the situation in which an officer with probable cause fails to take the next step to get a warrant, and thereby, "blunders," the failure of probable cause case has nothing to do with "blundering."¹ In this case, for example, the officers con-

¹The Court's general approach to warrantless searches has been to hold a search unreasonable unless there is a warrant or the existence of an exception to the requirement. Whether an officer's "good faith/reasonable mistake" should be an exception to the warrant requirement—given the existence of probable cause—is a question that is not presented and that involves other important issues. Whether an exception should not exist unless "justified by absolute necessity" (Frankfurter, J. dissenting, *United States v. Rabinowitz*, 339 U.S. 56 at 70 (1950) or whether it should join one of those "few in number and carefully delineated," (Powell, J., *United States v. United States District Court*, 407 U.S. 297 at 318 (1972) requires an analysis of the history of the Fourth Amendment as well as the likely result of the police conduct if this potentially eviscerating exception is engrafted onto the warrant clause. The "blunder" argument is an appropriate consideration in deciding that question because, among other things, the result, if it prevails, is not a search without government adherence to the probable cause standard.

ducted a long investigation, and detailed everything in the application for warrant. They did not “blunder,” they just did not have enough incriminating information to justify a search of Leon’s house—a circumstance that the Fourth Amendment contemplated and for which it prohibited a search. There is a “blundering” issue. The only question is whether the Fourth Amendment should validate a search when the world has been parsimonious with evidence and, thus, provided the officer with less than probable cause.

The contention that exclusion “benefits only those who otherwise would be found guilty” (Govt. Brief 22) ought to be immediately ignored in discussing the creation of an exception to a constitutional standard. Justice Blackmun put the matter to rest in *United States v. Johnson*, 457 U.S. 537 (1982), quoting Justice Harlan who, also, undoubtedly thought the issue had been put to rest long before he spoke:

We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only because the government has offended constitutional principle in the conduct of his case. (*Id.* at 561)

If, on the other hand, the government is truly concerned that the exclusion affords no remedy for “innocent victims of unlawful police conduct” (Govt. Brief 23) it has the power to pass legislation to remedy the error.

The contention that the exclusion of evidence creates “the public perception that there is something wrong with a system of criminal justice that frees guilty defendants on technicalities,” (Govt. Brief 23) captures the bankruptcy of the government’s “good faith/reasonable mistake” proposal. It demonstrates not only the absurdity of a public

opinion poll approach to constitutional rights, but provides an example of the difference between this case and those of the nature of *Massachusetts v. Sheppard*, No. 82-963. The officers in *Sheppard* had probable cause and they made an application for warrant that was specific as to the places to be searched and the items to be seized. Whether the Court considers the magistrate's ministerial function in filling out the warrant improperly to be "harmless error" or merely a case in which there is no Fourth Amendment violation, *Sheppard* presents a "technicality." The government should be ashamed for suggesting that a search without probable cause—whatever the motive—is comparable to the technical failure in *Sheppard*. If a search without probable cause is a "technicality" to be shunted aside by the government's protestation of good motive, it will matter little what the public perception is of our system of criminal justice—we will have none.

CONCLUSION

The Minnesota State Bar Association respectfully submits that this Court should not amend the probable cause standard of the Fourth Amendment by allowing a "good faith/reasonable mistake" exception to the constitutional judgment of the Framers.

Respectfully submitted,

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A-1

APPENDIX

U.S. Department of Justice
Office of the Solicitor General
Washington, D.C. 20530

October 20, 1983

Bruce H. Hanley, Esquire
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1750 First Bank Place East
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Re: United States v. Leon
No. 82-1771

Dear Mr. Hanley:

In response to your letter of October 13, 1983, I hereby consent to the filing of a brief amicus curiae on behalf the Minnesota State Bar Association in the Supreme Court in this case.

Sincerely yours,

/s/ Rex E. Lee
Solicitor General

A-2

Law Offices
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November 1, 1983

Mr. Bruce Hanley
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Minneapolis, Minnesota 55402

RE: United States v. Leon
Supreme Court No. 82-1771

Dear Mr. Hanley:

This is to advise you that we consent on behalf of Respondent Leon to the filing of an amicus curiae brief by the Minnesota State Bar Association.

Very truly yours,

LAW OFFICES OF BARRY TARLOW
/s/ Barry Tarlow

BT:dlr

NOV 10 1983

Nos. 82-1711 and 82-1771

STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF COLORADO, *Petitioner*,

v.

FIDEL QUINTERO, *Respondent*.

UNITED STATES OF AMERICA, *Petitioner*,

v.

ALBERTO ANTONIO LEON, *et al.*, *Respondents*.

On Writs Of Certiorari To The Supreme Court Of Colorado And
The United States Court Of Appeals For The Ninth Circuit

**BRIEF OF THE NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF COLORED PEOPLE,
THE AMERICAN CIVIL LIBERTIES UNION, AND
THE SOUTHERN POVERTY LAW CENTER,
AS AMICI CURIAE**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 82-1711 and 82-1771

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On Writs Of Certiorari To The Supreme Court Of Colorado And
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BRIEF OF THE NATIONAL ASSOCIATION FOR
THE ADVANCEMENT OF COLORED PEOPLE,
THE AMERICAN CIVIL LIBERTIES UNION, AND
THE SOUTHERN POVERTY LAW CENTER,
AS *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

This brief is respectfully submitted on behalf of the National Association for the Advancement of Colored People, the American Civil Liberties Union, and the Southern Poverty Law Center.¹

¹ This brief is filed with the consent of the parties; letters consenting to the filing of this brief have been lodged with the Clerk.

The National Association for the Advancement of Colored People (NAACP) was formed in 1909 as a non-profit membership corporation. It has nearly 2000 branches throughout the nation and a 1982 membership of approximately 450,000. The basic aims and purposes of the NAACP are to secure the elimination of all racial barriers that deprive black citizens of the privileges and burdens of equal citizenship rights in the United States. To this end, the NAACP devotes much of its funds and energies to an extensive program of litigation in pursuit of its declared purposes. The Association has a particular interest in these cases because of its concern that the rights under the Fourth Amendment of all citizens, and particularly minority citizens, be preserved and enforced by the courts.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of over 250,000 members dedicated to protecting and preserving the liberties safeguarded by the Constitution and the Bill of Rights. The prohibition against unreasonable searches and seizures contained in the Fourth Amendment is critically important among those safeguards. The ACLU has participated in many of the leading cases in which this Court has given shape and content to the Fourth Amendment's guarantee. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the ACLU filed the only brief before the Court urging application of the exclusionary rule to the States, and was permitted by the Court to raise the point at oral argument. 367 U.S. at 646 n.3. The ACLU appeared as *amicus curiae* in *Illinois v. Gates*, ___ U.S. ___, 103 S. Ct. 2317 (1983), and appears again here because of its belief that these cases present the most serious risk in recent years to the preservation of the requirements of the Fourth Amendment, and therefore to the right of all

Americans to be secure against unreasonable searches and seizures.

The Southern Poverty Law Center (the Center) is a non-profit law firm, located in Montgomery, Alabama, that specializes in the defense and enforcement of constitutional rights, particularly those of the less fortunate, throughout the southeastern United States. The Bill of Rights serves as the foundation for the Center's extensive constitutional litigation. The Center is convinced that the adoption of a "reasonable mistake" modification in these cases would erode the fundamental protections of the Fourth Amendment. The Center seeks to take an active stance against this threat of constitutional erosion through participation as *amicus curiae* in these cases.

The NAACP, the ACLU, and the Center hope that their participation will be of material assistance to the Court in weighing the impact upon Fourth Amendment protections threatened by the proposed modification of the exclusionary rule.

SUMMARY OF ARGUMENT

The cases now before the Court pose a question critical to the continued effectiveness of the Fourth Amendment. Adoption of the proposed modification of the exclusionary rule will go far to nullify the constitutional requirement of probable cause and to make all citizens less secure against unreasonable searches and seizures.²

A. The Fourth Amendment prohibits unreasonable searches and seizures. The touchstone of reasonableness

²This brief is limited to *Colorado v. Quintero*, No. 82-1711, and *United States v. Leon*, No. 82-1771, because the ACLU directly represents the Respondent in *Massachusetts v. Sheppard*, No. 82-963, the third companion case before the Court.

is probable cause to believe that a crime has been committed. The probable cause standard reflects the judgment of the Framers of the Constitution as to the proper balance between the competing interests of personal privacy and effective law enforcement. This standard is a "practical, nontechnical conception" dealing with "the factual and practical considerations of everyday life," and it accordingly allows room for the mistakes of "reasonable men, acting on facts leading sensibly to their conclusions of probability," *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). Since the probable cause standard calls only for "a practical, common-sense decision," *Illinois v. Gates*, ____ U.S. ____, 103 S. Ct. 2317, 2332 (1983), there is adequate flexibility within constitutional bounds to accommodate the reasonable needs of effective law enforcement.

B. The exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914), held applicable to the States in *Mapp v. Ohio*, 367 U.S. 643 (1961), forbids the use of unconstitutionally obtained evidence against the victim of the violation during the prosecution's case-in-chief and thus effectuates the Fourth Amendment's prohibition against unreasonable searches and seizures by "compel[ling] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

Modification of the exclusionary rule by engrafting upon it an exception for so-called "reasonable mistakes" by police officers will encourage violations of the Fourth Amendment. It is pointless to speak of a "reasonable" violation of the flexible probable cause standard, which already allows room for reasonable misjudgments. It is inevitable that the proposed modification would nullify the requirement of probable cause by encouraging police

officers to act on mere suspicion with the knowledge that the "reasonable mistake" modification will make the illegally seized evidence admissible.

The further proposal that unconstitutionally obtained evidence be admissible whenever police have obtained a warrant would make magistrates' judgments substantially unreviewable; an invalid warrant would constitute adequate support for the invalid search and seizure since the police officer's "mistake" would be deemed reasonable and the magistrate's mistake in issuing the warrant would be ignored. The protections of the Fourth Amendment are too important to be left to the unreviewable discretion of police officers and magistrates in this manner.

C. No decision of this Court supports the proposed modification of the exclusionary rule. Limited uses of illegally obtained evidence have been authorized in peripheral situations where the incremental deterrent effect of excluding the evidence would have added only slightly, if at all, to the basic deterrence achieved by exclusion of the evidence from the government's case-in-chief. See *United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Janis*, 428 U.S. 433 (1976); *Stone v. Powell*, 428 U.S. 465 (1976); and *United States v. Havens*, 446 U.S. 620 (1980). These decisions provide no basis for significantly weakening the exclusionary rule in the case-in-chief itself.

Petitioners' contention that the exclusionary rule should not be applied to "reasonable mistakes" has been rejected by the Court. In *United States v. Johnson*, 457 U.S. 537 (1982), dealing with the retroactivity of the ruling in *Payton v. New York*, 445 U.S. 573 (1980), that a warrant is required for a routine felony arrest in the suspect's home, the Court, finding that the issue had been

"unsettled" prior to *Payton*, rejected that circumstance as a ground for denying retroactivity to the *Payton* holding. The Court pointed out that if rulings resolving unsettled Fourth Amendment issues were made nonretroactive, then "in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior." 457 U.S. at 561. The policies of the exclusionary rule are similarly well served by application of the rule in the many cases involving arrests and searches made near the dividing line between probable cause and mere suspicion. As retired Justice Potter Stewart has recently written, "if this exception were adopted, police officers might shift the focus of their inquiry from 'what does the Fourth Amendment require?' to 'what will the courts allow me to get away with?' It seems inevitable in these circumstances that adoption of the proposed exception would result in more Fourth Amendment violations." Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1403 (1983).

ARGUMENT

Adoption Of The Proposed "Reasonable Mistake" Modification Of The Exclusionary Rule Would Be In Dereliction Of This Court's Duty To Preserve For All Citizens The Freedom From Unreasonable Searches And Seizures Guaranteed By The Fourth Amendment

Introduction

The exclusionary rule cases before the Court present a question of overriding importance concerning this Court's role as guardian of the freedoms enshrined in the Constitution. As we shall demonstrate, the proposed "reasonable mistake" modification presents a grave

threat to the Fourth Amendment freedoms of all citizens. The adoption of the proposed modification would signal to law enforcement officials that the Court will not insist on compliance with the Fourth Amendment requirement of probable cause but rather is prepared to encourage law enforcement officials to proceed with arrests and searches of citizens on mere suspicion. We urge the Court to reaffirm the importance of the Fourth Amendment protection of probable cause by emphatically rejecting the modification of the exclusionary rule now proposed.

A. The Fourth Amendment Reflects The Carefully Considered Judgment Of Our Founding Fathers That Arrests And Searches Should Be Undertaken Only In Accordance With the Flexible Standard Of Probable Cause

The Fourth Amendment to the Constitution, applicable to the States through the Fourteenth Amendment, provides that:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourth Amendment prohibits only "unreasonable" searches and seizures. This Court has repeatedly held that an arrest or search can be reasonable only if probable cause exists.³ The need for probable cause is clear whether the police officer is entitled to proceed without an arrest or search warrant, or is acting pursuant to a

³ We shall address in this brief only full-blown arrests and searches, not the brief and limited intrusions upon privacy (far short of full arrests and searches) that the Court has authorized in *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny.

warrant. See *Dunaway v. New York*, 442 U.S. 200 (1979); *Illinois v. Gates*, ____ U.S. ____, 103 S. Ct. 2317 (1983).

Probable cause is the cornerstone of substantive Fourth Amendment protection and was designed by the Framers of the Constitution to reflect a proper balance between the competing interests of personal privacy and law enforcement. As this Court has recognized, the "long-prevailing standards" of probable cause "seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). As the Court observed in *Dunaway*, "[t]he standard of probable cause thus represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment." *Dunaway v. New York*, *supra*, 442 U.S. at 208. The standard also represents a recognition that searches made on less than probable cause are more likely than those with probable cause to intrude upon the privacy of innocent persons.

Probable cause is a common-sense concept that does not require certainty of guilt. As stated in *Brinegar*:

"Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." 338 U.S. at 175-76, *quoting Carroll v. United States*, 267 U.S. 132, 162 (1925).

The Court's most recent exposition concerning probable cause occurred only last Term in *Illinois v. Gates*, ____ U.S. ____, 103 S. Ct. 2317 (1983). There, the decision

reaffirmed the "central teaching" of the Court's earlier decisions that probable cause is a "practical, nontechnical conception." "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." — U.S. at —, 103 S. Ct. at 2328, *quoting Brinegar v. United States, supra*, 338 U.S. at 175, 176.

The Court in *Gates* "reaffirm[ed] the totality of the circumstances analysis that traditionally has informed probable cause determinations." — U.S. at —, 103 S. Ct. at 2332. Under this test, it is the task of a magistrate considering an application for a search warrant

"to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.*

"[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* at 2335 n.13.

The "probable cause" standard leaves room for reasonable police errors of fact and of law. In *Brinegar*, the Court made this important observation:

"Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for

accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." 338 U.S. at 176. (Emphasis supplied.)

The Fourth Amendment's tolerance of reasonable police mistakes is reflected in the rulings of this Court. In *Hill v. California*, 401 U.S. 797 (1971), the Court upheld a warrantless arrest and subsequent search incident to the arrest where the police had probable cause to arrest an individual named Hill but through a mistake in identity arrested another person in Hill's apartment. The Court found the officers' actions consistent with the Fourth Amendment. The officers' mistake in arresting the wrong person did not negate the fact that probable cause existed for the arrest.

The Court's decision in *Michigan v. DeFillippo*, 443 U.S. 31 (1979), also reflects the flexibility embodied in the probable cause standard. There, the police arrested the respondent for a violation of a Michigan statute which was later held unconstitutional. Noting that probable cause was present at the time of the arrest, the Court upheld the arrest as reasonable under the Fourth Amendment. The Court rejected the claim that the police should have anticipated that the statute would be found unconstitutional.

The Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978), is also illustrative. In *Franks*, the Court held that a search warrant cannot be attacked on the basis of erroneous "facts" provided by an informant to a police officer, so long as the officer reasonably credits those facts.

The foregoing discussion is intended to highlight the flexibility embodied in the Fourth Amendment. As this

Court's decisions demonstrate, the probable cause standard was carefully chosen by our Founding Fathers as the appropriate balance of the citizens' rights in personal privacy, on the one hand, and in effective law enforcement, on the other.

B. The Proposed Modification Of The Exclusionary Rule Will Encourage Violations Of The Fourth Amendment

1. The Exclusionary Rule Preserves The Fourth Amendment Freedoms Of All Citizens

The exclusionary rule adopted in federal prosecutions in *Weeks v. United States*, 232 U.S. 383 (1914), and extended to state prosecutions in *Mapp v. Ohio*, 367 U.S. 643 (1961), was "adopted to effectuate the Fourth Amendment right of all citizens 'to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . .' Under this rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." *United States v. Calandra*, 414 U.S. 338, 347 (1974). The exclusionary rule comes into play, of course, only when police conduct is "unreasonable" within the meaning of the Fourth Amendment. The exclusionary rule is applicable, therefore, only where the Framers of the Constitution forbade the police to secure evidence in the manner in which it was obtained.

The exclusionary rule protects all citizens by "compel[ling] respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960). The rule removes this incentive by attempting to ensure that law enforcement officials will not be able to use evidence of crime obtained through violations of Fourth Amendment standards. The rule is intended,

moreover, to deter all law enforcement officials from committing such violations. As stated by Justice Stevens, concurring in *Dunaway v. New York*, *supra*, 442 U.S. at 221: "The justification for the exclusion of evidence obtained by improper methods is to motivate the law enforcement profession as a whole—not the aberrant individual officer—to adopt and enforce regular procedures that will avoid the future invasion of the citizen's constitutional rights."

The exclusionary rule continues to be the only available means of securing Fourth Amendment protections.⁴ As retired Justice Stewart has recently written, for "the vast majority of fourth amendment violations," "a remedy is required that inspires the police officer to channel his enthusiasm to apprehend a criminal toward the need to comply with the dictates of the fourth amendment. There is only one such remedy—the exclusion of illegally obtained evidence." Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1389 (1983) [hereinafter cited as "Stewart"]. Justice Jackson succinctly explained in *Brinegar* how the exclusionary rule works to protect Fourth Amendment rights:

"If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be,

⁴ Petitioners have not seriously argued that alternative means have been developed to protect Fourth Amendment rights. The United States suggests that the absence of effective alternatives is "simply not a controlling consideration." Brief for the United States, at 88.

and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty." 338 U.S. at 181 (dissenting opinion). (Emphasis supplied.)

In the absence of the exclusionary rule, the disincentive associated with unconstitutional behavior would disappear. The result would be a significant reduction in Fourth Amendment protection.⁵

2. The proposed modification would encourage police officers to conduct arrests and searches on less than probable cause

The modification of the exclusionary rule now proposed would give official encouragement to arrests and searches on less than probable cause.

As described by the United States, the modification would apply (i) to warrantless arrests and searches by police officers who believe that a crime is being committed in their presence (Brief for the United States, at 47-57) and (ii) to searches made pursuant to a judicially

⁵ The New York Deputy Police Commissioner stated after the decision in *Mapp v. Ohio*, 367 U.S. 643 (1961):

"The *Mapp* case was a shock to us. We had to reorganize our thinking, frankly. Before this, nobody bothered to take out search warrants. Although the Constitution requires warrants in most cases, the Supreme Court had ruled [until 1961] that evidence obtained without a warrant—illegally, if you will—was admissible in state courts. So the feeling was, why bother?" *The New York Times*, April 28, 1965, p. 50.

authorized warrant (Brief for the United States, at 57-68).

In the first of these situations, the United States urges that police officers must be free to respond to on-the-scene situations that develop in their presence without fear that their actions will be condemned by the courts long after the event. The Fourth Amendment, however, provides police officers with ample leeway to act in such situations. It is well established that "the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense." *Michigan v. DeFillippo*, *supra*, 443 U.S. at 36.

Petitioners contend that in cases near the dividing line between probable cause and mere suspicion the exclusionary rule should be inapplicable even if it turns out that the officer proceeded without probable cause. According to Petitioners, an officer proceeding without probable cause in a close case has made a "reasonable mistake" about the requirements of the Fourth Amendment, and no useful deterrent purpose would be served by applying the exclusionary rule in such instances. *See, e.g.*, Brief for the United States, at 30-31, 47-57.

Petitioners' position that arrests and searches made on the basis of suspicion should not lead to application of the exclusionary rule must be rejected for two reasons. First, if police action is taken without probable cause, then it cannot be based on a "reasonable" mistake within the contemplation of the Fourth Amendment. As noted, the probable cause standard affords ample leeway for reasonable police judgment, including reasonable errors. As the Court observed in *Brinegar*, however, "the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability" of criminal

activity. 338 U.S. at 176. A police officer who has proceeded without probable cause has necessarily made an "unreasonable" error in the eyes of the Fourth Amendment.⁶ The "reasonable mistake" modification, therefore, is a contradiction in terms and at odds with the Fourth Amendment.

Second, the proposed modification would effectively destroy the probable cause standard and make probable cause a mere exhortation without practical significance. Arrests and searches made on suspicion would carry with them potential benefits for police officers in the form of admissible evidence, while threatening none of the adverse consequences that must accompany unconstitutional behavior. Officers would quickly learn that as long as they could point to some basis for their suspicion, an arrest or search could be undertaken without probable cause. If the police action produced evidence, the evidence would be admissible. If no evidence were secured, the officer would have lost nothing for the effort. The result in either event would be the encouragement of police action forbidden by the Fourth Amendment.

A corresponding impairment of Fourth Amendment protection will result if, as the United States urges, evidence seized pursuant to an invalid warrant is rendered admissible in criminal proceedings. The position of the United States on this point, in effect, is that, except in some undefined category of rare cases, a magistrate's assessment of probable cause should be conclusive.⁷

⁶ See, e.g., *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Dunaway v. New York*, 442 U.S. 200 (1979); *Whiteley v. Warden*, 401 U.S. 560 (1971).

⁷ The United States states that suppression of evidence secured pursuant to a warrant "may be justified if the factors relied on by the magistrate 'were so lacking in indicia of probable cause as to render

Elimination of the exclusionary rule where a warrant has been issued will permit an illegal warrant to shield an illegal search or seizure. Since a warrant based on suspicion will assure admissibility, probable cause will no longer be the operative standard for a police officer deciding whether he has sufficient information to present to a magistrate. The officer will have every incentive to proceed on suspicion, on the chance that the magistrate will issue the warrant, and no incentive to engage in further investigation so as to satisfy the Fourth Amendment's requirement of probable cause.

The United States will no doubt respond that magistrates are available to prevent the indiscriminate use of unlawful warrants. Magistrates need not be lawyers, however, and they "certainly do not remain abreast of each judicial refinement of the nature of 'probable cause.'" *Illinois v. Gates, supra*, ____ U.S. ____, 103 S. Ct. at 2330. Without intending any disrespect for persons serving as magistrates, *Amici* submit that these individuals simply cannot be entrusted with the ultimate preservation of our Fourth Amendment freedoms, without the modulating effects of judicial review available for all other infringements of constitutional rights. We agree with retired Justice Stewart that "if the fourth amendment's probable cause requirement is to be enforced, reviewing courts must have the authority on occasion to inform magistrates in a meaningful way that warrants

official belief in its existence entirely unreasonable.'" Brief for the United States, at 65 (emphasis supplied). This suggests that the United States would permit continued application of the exclusionary rule in those few cases in which there is no information to support the issuance of the warrant. This concession cannot justify the dilution of probable cause that will inevitably result if the modification is adopted.

based on something less than probable cause are not to be tolerated." Stewart, *supra*, 83 Colum. L. Rev. at 1403.

This Court has never accorded conclusive effect to magistrates' determinations of probable cause. *Franks v. Delaware*, 438 U.S. 154 (1978); *Nathanson v. United States*, 290 U.S. 41 (1933). In *Gates*, the Court reaffirmed that although the scope of review is limited, "courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." ____ U.S. at ____, 103 S. Ct. at 2332. The Court reiterated that "the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed." ____ U.S. at ____, *id.* at 2332, quoting *Jones v. United States*, 362 U.S. 257, 271 (1960).

Petitioners' proposed modification of the exclusionary rule is thus in reality an attack on the constitutional requirement of probable cause. The modification rests on the view that it is simply not important—where the issue is close—whether arrests and searches are made on the basis of probable cause or on the basis of suspicion. Indeed, the United States openly admits this. According to the United States, resolution of the "fact-specific questions" of probable cause in such cases as *Leon* and *Quintero* does

"little to advance understanding of Fourth Amendment principles of general importance. In such instances, it will generally be far easier to determine the applicability of the reasonable mistake exception than to grapple with the nettlesome but *relatively inconsequential* underlying substantive question." Brief for the United States, at 83. (Emphasis added.)

The need for probable cause for police action is anything but "inconsequential"; it is the heart of the Fourth Amendment. Petitioners apparently fail to recognize that

this Court is not free to revise the Constitution or to reevaluate the Framers' basic judgment, reached after careful balancing of the interests at stake, that law enforcement officials should be forbidden from proceeding with searches and seizures except upon probable cause and should not have the use of evidence secured through police action based only on suspicion.

Petitioners repeatedly assert that the exclusionary rule imposes significant "costs" on the criminal justice system. The balance of costs and benefits, however, has already been struck by the Framers. The exclusionary rule does no more than effectuate the Fourth Amendment, and the rule, therefore, imposes no "costs" beyond those that are intended to be imposed by obedience to the Constitution.⁸ *Amici* submit that the "costs" of complying with the Fourth Amendment cannot justify the virtual abandonment of the standard of probable cause. If the probable cause standard is to be abandoned, the constitutionally designated processes for amendment must be observed.

The proposed modification would make probable cause a relic of a bygone era. *Amici* submit that the issue of probable cause should not be relegated to some sort of

⁸ Retired Justice Stewart has observed that:

"Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the fourth amendment itself. It is true that, as many observers have charged, the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant. But these same critics sometimes fail to acknowledge that, in many instances, the same extremely relevant evidence would not have been obtained had the police officer complied with the commands of the fourth amendment in the first place."

Stewart, supra, 83 Colum. L. Rev. at 1392. See also *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

constitutional oblivion. The courts must continue to decide the issue of probable cause and must exclude evidence secured where this fundamental requirement is not met. The Fourth Amendment's protection against arbitrary invasions of privacy will inevitably wilt and disappear if it is not given content and enforced by the courts.⁹

C. No Decision Of This Court Provides A Basis For The Proposed Modification Of The Exclusionary Rule, And The Decision In *United States v. Johnson*, 457 U.S. 537 (1982), Mandates Its Rejection

Petitioners point to a number of this Court's decisions as purportedly supporting the proposed modification of the exclusionary rule. As we shall demonstrate, however, the Court's decisions do not provide a basis for the modification, but rather underscore the need for the retention of the exclusionary rule in criminal trials. The Court's recent pronouncement in *United States v. Johnson*, 457 U.S. 537 (1982), in particular mandates rejection of the modification.

The Court's decisions in such cases as *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury questions based upon illegally obtained evidence); *United States v.*

⁹ Probable cause issues such as those presented in *Quintero* and *Leon* arise frequently. If such cases are decided in the future under a "reasonable mistake" rule rather than under the Fourth Amendment standard of probable cause, probable cause will quickly lose its place as a requirement of constitutional importance. Prosecutors will regularly proceed, as the United States and Colorado have in this Court, by seeking to avoid decision of the issue of probable cause. See Petition for Certiorari in *United States v. Leon*, at 9 n.10; Brief for Petitioner in *Colorado v. Quintero*, at 10-11. The Court, of course, is free to decide the probable cause issues in these cases notwithstanding Petitioners' submissions.

Janis, 428 U.S. 433 (1976) (use of evidence illegally obtained by State officer in federal civil proceeding); *Stone v. Powell*, 428 U.S. 465 (1976) (consideration by federal habeas corpus court of Fourth Amendment claim already heard by a state tribunal); and *United States v. Havens*, 446 U.S. 620 (1980) (use of illegally obtained evidence for impeachment at trial), all explicitly rest on the rationale that the deterrence achieved by the exclusionary rule would be enhanced only minimally, if at all, if the exclusionary rule were extended beyond its core application during the government's case-in-chief. As observed by the United States, "it appeared unlikely to the Court" in each of those cases "that police officers would be encouraged to engage in prohibited conduct by the availability of the particular uses of unlawfully seized evidence there permitted." Brief for the United States, at 42.

In the present situation, by contrast, it is clear for the reasons previously discussed that the proposed modification will operate to encourage the police to engage in unconstitutional conduct. The Court's decisions refusing to extend the rule beyond the government's case-in-chief, therefore, provide no basis for the current effort to sap the rule's vitality in the case-in-chief itself. Indeed, the Court's reliance on the efficacy of the exclusionary rule at trial as a basis for the Court's refusal to exclude illegally obtained evidence in other proceedings only serves to underscore the need for retention of the exclusionary rule in its core application.

Nor do the Court's decisions in *Michigan v. DeFillippo*, 443 U.S. 31 (1979), and *Hill v. California*, 401 U.S. 797 (1971), provide any basis for modifying the exclusionary rule. See Brief for the United States, at 53-55. In both cases, probable cause existed for the arrests, and the Court held only that the subsequent invalidation of

the criminal statute in *DeFillippo* and the error by the police concerning the identity of the arrestee in *Hill* did not detract from the lawfulness of the arrests under the Fourth Amendment. Both cases dealt with constitutional police action and do not suggest that unconstitutional police actions should be placed beyond the reach of the exclusionary rule.¹⁰

Nor is the Petitioners' heavy reliance on the Court's decision in *United States v. Peltier*, 422 U.S. 531 (1975), warranted. See Brief for the United States, at 34, 37, 43. *Peltier* was a retroactivity case that addressed the applicability of the rule announced in *Almeida-Sanchez v.*

¹⁰ The Court's decisions in *Alderman v. United States*, 394 U.S. 165 (1969), *Michigan v. Tucker*, 417 U.S. 433 (1974), *Brown v. Illinois*, 422 U.S. 590 (1975), and *United States v. Caceres*, 440 U.S. 741 (1979), likewise do not support the drastic curtailment of the exclusionary rule proposed by Petitioners.

In *Alderman*, the Court reaffirmed the exclusionary rule, 394 U.S. at 174-75, and simply refused to enlarge its scope by permitting its invocation by persons whose constitutional rights had not been violated. In *Brown*, the issue was whether a confession was the product of an unconstitutional arrest. Both the majority opinion, which reversed the conviction, and the concurring opinion, which proposed remand for a "taint" hearing, recognized that a confession tainted by a Fourth Amendment violation is inadmissible in a criminal trial.

Tucker did not involve a Fourth Amendment issue but rather a pre-*Miranda* violation of the *Miranda* rule. There, the Court noted that the defendant's incriminating statement had been excluded at trial. The Court held only that the testimony of a prosecution witness mentioned in defendant's statement would not also be suppressed. *Caceres* likewise presented no Fourth Amendment question. The case involved only a violation of agency regulations which did not infringe on any Fourth Amendment or other constitutional right of the defendant. Fourth Amendment exclusionary rule precedents were simply inapplicable. 440 U.S. at 754-55.

United States, 413 U.S. 266 (1973), to border searches conducted prior to the date of that decision. The Court found that the Border Patrol's pre-*Almeida-Sanchez* practices were "in reliance upon a validly enacted statute, supported by longstanding administrative regulations and continuous judicial approval" and therefore "conform[ed] . . . to the prevailing statutory [and] . . . constitutional norm." 422 U.S. at 541, 542. The Court reasoned that in light of the prior law supporting the pre-*Almeida-Sanchez* practices, there was no basis upon which it could "be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 422 U.S. at 542. The Court accordingly declined to apply the exclusionary rule to the Border Patrol's pre-*Almeida-Sanchez* conduct.

The Court's subsequent decision in *United States v. Johnson*, 457 U.S. 537 (1982), demonstrates the limited reach of the Court's holding in *Peltier*. In *Johnson*, the Court considered the applicability of the rule announced in *Payton v. New York*, 445 U.S. 573 (1980), to arrests made prior to the date of that decision. In *Payton*, the Court, resolving a previously unsettled question, held that an arrest warrant is necessary when police officers make a routine felony arrest of a person in his own home. The United States urged in *Johnson* that the Court's decision in *Peltier* was controlling and that police officers proceeding prior to *Payton* could not be faulted for failing to obtain an arrest warrant. The United States urged that the deterrent purposes of the exclusionary rule would not be served by application of the rule to pre-*Payton* arrests.

The Court in *Johnson* rejected the United States' reliance on *Peltier*. The Court noted that the rule an-

nounced in *Almeida-Sanchez*, which was at issue in *Peltier*, "represented a 'clear break' with the past" and "[f]or that reason alone, under controlling retroactivity precedents, the nonretroactive application of *Almeida-Sanchez* would have been appropriate even if the case had involved no Fourth Amendment question." *United States v. Johnson*, *supra*, 457 U.S. at 558. The Court then concluded that the situation in *Johnson*—where the necessity for an arrest warrant was "unsettled"—was readily distinguishable for exclusionary rule purposes from the situation in *Peltier*—where the Border Patrol's actions clearly conformed in all respects with the law as it stood prior to *Almeida-Sanchez*. 457 U.S. at 558, 560-61.

In *Johnson*, the Court rejected the United States' contention that if the lawfulness of police conduct is debatable, the police should be entitled to proceed and the exclusionary rule should be inapplicable to any evidence secured. The Court found that this approach would jeopardize Fourth Amendment freedoms:

"If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question." *United States v. Johnson*, *supra*, 457 U.S. at 561.

In *Johnson*, the Court concluded that the exclusionary rule must be applied in close cases to induce police officers to act within the bounds of the Fourth Amendment. This should be the Court's ruling here as well. Law enforce-

ment officials cannot be provided with "official certainty" that evidence obtained through a search or seizure without probable cause will be admissible at a criminal trial. *United States v. Johnson, supra*, 457 U.S. at 561. As retired Justice Stewart has concluded, if the policies of the exclusionary rule, as held in *Johnson*, are "served by requiring exclusion when police officers make a mistake while acting in a constitutional 'gray area,' it is clear that the same policies are served when officers act unconstitutionally by engaging in conduct that is prohibited under settled fourth amendment precedent." Stewart, *supra*, 83 Colum. L. Rev. at 1402-03.

CONCLUSION

Petitioners suggest that the proposed modification should be adopted in the interests of effective law enforcement. Contrary to Petitioners' suggestion, however, the issue is not whether effective law enforcement is a desirable goal. As we have noted, the Fourth Amendment provides ample room for effective law enforcement. The issue here is whether the particular balance between personal privacy and law enforcement embodied in the Fourth Amendment will be preserved and enforced. In our society, the ends do not justify the means, and *Amici* submit that the ends of law enforcement cannot justify the sacrifice of the requirement of probable cause. We cannot improve on this Court's declaration nearly seventy years ago in *Weeks*:

"The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." 232 U.S. at 393.

We submit that the issues surrounding the proposed "reasonable mistake" or "good faith" modification of the exclusionary rule have now been fully and exhaustively examined and that the proposed weakening of the exclusionary rule is simply inconsistent with the preservation of Fourth Amendment rights. The proposed modification of the exclusionary rule should be firmly and finally rejected by this Court.

Respectfully submitted,

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NO. 82-1771

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

UNITED STATES OF AMERICA,
Petitioner,

v.

ALBERTO ANTONIO LEON, ET AL.,
Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

**BRIEF OF THE TEXAS CRIMINAL DEFENSE
LAWYERS ASSOCIATION
VIRGINIA COLLEGE OF CRIMINAL
DEFENSE ATTORNEYS**

AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether evidence obtained as a result of a search warrant subsequently held to be defective for a lack of probable cause should nevertheless be admitted into evidence on the basis of a good faith exception to the exclusionary rule.

INTEREST OF AMICI CURIAE

The Texas Criminal Defense Lawyers Association and the Virginia College of Criminal Defense Attorneys are two non-profit corporations whose membership is comprised of more than 1,500 lawyers, who are Texas and Virginia citizens and attorneys, all of whom are primarily engaged in positions bringing them into daily contact with the criminal justice system, as advocates, law professors or judges of the State or Federal Courts.

Among the stated objective of both organizations is to protect and insure by rule of law those individual rights guaranteed by State and Federal Constitutions in criminal cases, and to resist efforts which are being made to curtail these rights. A cornerstone of the organizations' objective, and of our criminal justice system, is the protection of the individual right of privacy particularly in regard to unreasonable searches and seizures.

The Texas Criminal Defense Lawyers Association and the Virginia College of Criminal Defense Attorneys believe that the Petitioner's proposed good faith/reasonable belief exception to the exclusionary rule would effectively destroy the constitutional mandate against unreasonable searches and seizures found in the Fourth Amendment. The Amicus Curiae Committee of both the Texas Criminal Defense Lawyers Association and the Virginia College of Criminal Defense Attorneys has discussed this case and decided that this issue is of such profound importance to defense lawyers throughout the state and nation that the Texas Criminal Defense Lawyers Association and the Virginia College of Criminal Defense Attorneys should state its opposition to the proposed exception and offer its assistance to the Court.

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BRIEF OF THE TEXAS CRIMINAL DEFENSE
LAWYERS ASSOCIATION
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DEFENSE ATTORNEYS

AMICI CURIAE IN SUPPORT OF RESPONDENT

SUMMARY OF ARGUMENT

I. Petitioner's argument that substantial evidence is suppressed or that prosecutions are dismissed or not filed

as a result of the application of exclusionary rule is factually incorrect, and unsupported by any credible, impericle evidence. More importantly, the application of exclusionary rule results in the suppression of only such evidence as would have been unavailable to law enforcement authorities had they abided by the law and the mandate of the Constitution in the first place.

Petitioner's assertion that application of the exclusionary rule engenders disrespect for our judiciary also misses the point, for it is when those who we have entrusted to enforce our laws, violate them that breeds the greatest disrespect for law and order.

II. Probable cause supplies the minimally acceptable standard to determine whether a search warrant should issue. To adopt a good faith exception to the exclusionary rule would authorize the issuance of search warrants on less than probable cause, clearly in violation of the Constitutional mandate of the Fourth Amendment.

III. A good faith exception to the exclusionary rule would undermine the very purpose of the Fourth Amendment and would place upon the accused citizen the onerous burden of demonstrating not only that a search was conducted without probable cause but that the officers were acting in bad faith as well.

IV. The advent of sophisticated technology in assisting law enforcement personnel has gained the acceptance and approval of the various courts. The intrusive nature of these devices threatens the privacy of all citizens, creating a heightened, not diminished, need for Fourth Amendment protections.

ARGUMENT

I.

ACTUAL COST

Implicit in Petitioner's plea for a "good faith" exception to the exclusionary rule is the assumption that considerable evidence is excluded under existing practices. Factually, this assumption is not well founded. The Government's own studies indicate that motions to suppress are filed in only a small percentage of criminal cases [9% of all criminal cases surveyed, Government Accounting Office Study, Comp. Gen. Rep. No. GGD-79-45, Impact of the Exclusionary Rule on Federal Prosecutors (1979), at p. 10], and are rarely granted even then [evidence excluded in only 1.3% of the cases surveyed, Government Accounting Office Study, *supra*, at pp. 9-11]. More importantly, even assuming we could attribute more than a speculative causal relationship between motions to suppress and dismissals, only .7% of the cases in which evidence was excluded resulted in acquittal or dismissal. [Government Accounting Office Study, *supra*, at p. 11].

In short, there is no compelling need to further limit the exclusionary rule's application for its impact in terms of precluding the use of evidence in criminal trials has been greatly exaggerated.

REASONABLE PRICE

Moreover, the drafters of the Constitution most assuredly assumed that law enforcement officers would abide by the Constitution, recognizing that such adherence to the privacy concepts embodied in the Fourth Amendment

would result in relevant evidence not being available to law enforcement authorities.

"Those who drafted the Fourth Amendment may not have specifically contemplated the exclusionary sanction, but surely they expected the commands of the Amendment to be adhered to. 'To the extent that the police obey the constitutional commands, the community foregoes such advantages as it might enjoy from evidence that can only be obtained illegally.' " LaFave, *Search and Seizure*, Vol. 1, p. 23, West Publishing Co., St. Paul, 1978.

In short, the price paid by the application of the exclusionary rule is no more than would be exacted were the police to have acted lawfully and complied with the Constitution in the first place. The Drafters of the Constitution obviously considered this was not too high a price to insure that the citizen's privacy was vouchsafed.

SOCIETY'S COST

Petitioner suggests that the exclusionary rule may "... serve to lessen public respect for the judicial system" because its "indiscriminate application" will generate "disrespect for the law and administration of justice" [Petition for Writ of Certiorari, at pp. 71-72].

Petitioner's argument that the exclusionary rule is "indiscriminately applied" is misplaced and exaggerated. Few motions to suppress are granted and even fewer prosecutions result in acquittal or dismissal. And in those few cases that result in evidence being suppressed, society is deprived of no more evidence than it would had the officers acted lawfully in the first place. If there would have been no evidence to prosecute someone had the

officer's abided by the constitution then the fact that exclusion of that illegally obtained evidence may result in an acquittal would hardly seem "disproportionate". In practice, most cases in which motions to suppress are granted, nevertheless result in conviction, based on other legally obtained and admissible evidence.

And while Petitioner suggests that the "deterrence rationale" underlying the exclusionary rule is "hardly more than a wistful dream" [Petition at p. 72, quoting Burger, C.J., dissenting; *Bivens v. Six Unknown Agents*, 403 U.S. 398, at p. 415], the Government at the same time argues that its application has a "chilling effect on legitimate police activities" [Petition, at pp. 73-4]. Such arguments are inherently self-contradictory. It could hardly be suggested that application of the exclusionary rule substantially chills "legitimate police activity", without "deterring" illegal police conduct. If, as Petitioner suggests application of the exclusionary rule causes law enforcement authorities to conduct themselves more cautiously when their "course of action brings [them] closer to the indistinct line separating lawful from unlawful" police conduct [Petition at p. 73], then so much the better. That is precisely what was intended.

More importantly, it is when those entrusted to enforce our laws violate them that breeds greatest disrespect for law and order.

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. . . . Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government

becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961).

IMPERATIVE OF JUDICIAL INTEGRITY

Furthermore, deterrence of illegal police conduct is not the only theory underlying the exclusionary rule. The rule also serves to maintain the "imperative of judicial integrity" by extricating the courts from participation in that illegality. In this system of government the courts stand as the citizen's sole protection against its protectors.

"[Fourth Amendment rights] . . . are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. . . .

But the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside the court." *Brinegar v. U. S.*, at 180-181 (1949) (Jackson, J., dissenting).

As this Court noted in *Terry v. Ohio*, 392 U.S. 1 (1968), in addition to deterring illegal police conduct:

"The rule also serves another vital function—'the imperative of judicial integrity'. . . . Courts which sit under our Constitution can not and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." at p. 13.

II.

OBJECTIVE NOT SUBJECTIVE GOOD FAITH IS ALREADY THE APPLICABLE STANDARD FOR DETERMINING PROBABLE CAUSE

This Court has often reiterated that whether a search is performed with or without a warrant, the legality of

said search must be measured by the objective probable cause standard. *Illinois v. Gates*, ____U.S.____, 76 L.Ed. 2d 527 (1983); *Texas v. Brown*, ____U.S.____, 103 S.Ct. 1535 (1983); *Taylor v. Alabama*, 457 U.S. 687 (1982); *Massachusetts v. White*, 439 U.S. 280 (1978); *Ker v. California*, 374 U.S. 23 (1963); *Draper v. U. S.*, 358 U.S. 307 (1959).

To adopt the good faith exception on the scale suggested by petitioner would potentially uphold searches and seizures without the showing of probable cause expressly required by the Fourth Amendment. To allow such practice would relegate the Fourth Amendment to a hollow talisman, deteriorating the very foundation of the Amendment: "that no warrant shall issue but upon probable cause." "I do not propose that a warrant clearly lacking a basing in probable cause can support a 'good faith' defense to invocation of the exclusionary rule." *Illinois v. Gates*, ____U.S.____, 103 S.Ct. 2317, at p. 2345, note 17 (1983).¹

GOOD FAITH CONTAINED WITHIN PROBABLE CAUSE QUOTIENT

Last term, this Court again examined the unsettled question of what quantum of evidence constitutes probable cause to support the issuance of a search warrant. This Court announced the "totality of circumstances" test which requires the magistrate to review the sum total

1. "We do not face here the fit of *Williams* to an arrest or search by officers holding a warrant found deficient for lack of probable cause. We leave for later the question of whether a good faith proviso to the exclusionary rule ought ever to tolerate an arrest or seizure without probable cause measured objectively." *U. S. v. Mahoney* (5th Cir. 1983) 712 F.2d 956, at p. 960 n.4.

of all the facts and circumstances to determine the "fair probability" that the evidence sought will be in the place to be searched. *Illinois v. Gates*, ____U.S.____, 103 S.Ct. 2317, 2331-2 (1983).

By the very definition propounded by this Court, the good faith belief of the officer is an integral and necessary part of the probable cause formulation. *Draper v. United States*, 358 U.S. 307 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949): "We may assume that the officers acted in good faith in arresting the petitioner. But 'good-faith' on the part of the arresting officer is not enough." [citation omitted]. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police. *Beck v. Ohio*, 379 U.S. 89, 97 (1964). Thus, the officer is required to bring before the neutral and detached magistrate his subjective belief coupled with hard core evidence so that an independent determination can be made as to the existence of probable cause. If the arguments advanced by the Petitioner are adopted by this Court, then the requirement that an application for a search warrant be subjected to judicial scrutiny would become, at best, a mere formality. More importantly, a good faith exception would sanction the issuance of search warrants on less than probable cause. Such a result would clearly violate the letter and spirit of the Fourth Amendment.

PROBABLE CAUSE IS APPROPRIATE PROTECTION AGAINST ZEALOUS OFFICERS

The good faith or reasonable belief of law enforcement officers can never be considered as a viable alternative

to the probable cause requirement. The "experience and expertise" of the officer, often used as a synonym for good faith, rightfully belongs as part of the determination of probable cause but can not be used in substitution thereof. *U. S. v. Ortiz*, 422 U.S. 891 (1975); *U. S. v. Brignoni-Ponce*, 422 U.S. 873 (1975). The requirement of probable cause is not too high a price to pay for the security and safety of all citizens. While the real or manufactured good faith of the officer plays a vital role in the procurement of a search warrant, this Court has recognized the competition that exists between constitutional protections and the quest for evidence.

"It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers." See also: *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357, 75 L.Ed. 374, 382, 51 S.Ct. 153." *Coolidge v. New Hampshire*, 403 U.S. 443, 455, n. 4.

III.

GOOD FAITH EXCEPTION CREATES MORE PROBLEMS THAN IT SOLVES

In adopting a good faith exception to the exclusionary rule, this Court is, in reality, opening Pandora's box. The Fourth Amendment is constantly in a state of flux, and the addition of a good faith exception, which, by its very nature is undefinable, will only create more confusion and backlog the various state and federal courts. See, *LaFave, The Fourth Amendment in an Imperfect World*:

On Drawing "Bright Lines" and "Good Faith", 43 U. Pitt. L. Rev. 307, 354-359 (1982).

Should this Court adopt a good faith exception, then the vitality and strength of the Fourth Amendment would be reduced to fifty-four words that have no meaningful substance. As was noted by Justice Brennan, a good faith exception would stop all development of fourth amendment law because, without clear precedent, no officer would not be acting in good faith. *U. S. v. Peltier*, 422 U.S. 531, 554 (1975) (Brennan, J., dissenting).

Secondly, a good faith exception would change the entire focus of a Suppression hearing: rather than determining if the search or seizure violated the Fourth Amendment, the trial Court would be required to examine the subjective knowledge of the searching officer. Thirty-five years ago this Court recognized the conflicting interests of a citizen's Constitutional right to be protected from unlawful searches and seizure, and a police officer's quest for evidence: "officers engage in the often competitive enterprise of ferreting out crime." *Johnson v. U. S.*, 333 U.S. 10, 14 (1978). The testimony of the officers state of mind would consist of his self-serving and often uncontradicted testimony. As a practical matter, when viewed from the standpoint of the officer, an otherwise unlawful search or seizure may be redeemed simply by uttering words to the effect that the conduct was done in good faith.

POLICING THE POLICE

The reality of such an exception to the exclusionary rule would require our Courts to police the very individu-

als who have taken an oath to uphold the law. How often would an officer admit that his conduct was not grounded in a good faith belief?²

"Nothing can destroy a government more quickly than its own failure to observe its own laws, or worse, its disregard of the character of its own existence. . . . Our government is the potent, the omnipresent teacher for good or for ill, it teaches the whole people by its example. . . . If the government becomes a law breaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.

Mapp v. Ohio, 367 U.S. 643, 659 (1961).

Thus, the presumptively innocent citizen will have to bear the insurmountable burden of demonstrating that the officer violated the Fourth Amendment *and* was not acting in good faith when he did so. If our enlightened forefathers drafted the Constitution and Amendments to insure that nine guilty men go free so that the innocent citizen likewise obtains his freedom, then the good faith exception will guarantee that the innocent and guilty are punished.

IV.

TECHNOLOGICAL ADVANCES HEIGHTEN NEED FOR FOURTH AMENDMENT PROTECTIONS

This decade has marked the beginning of extraordinary technological advances which will undoubtedly change

2. The revelations in the book, "Prince of the City" shocked many lay people to find out that a Detective had committed perjury approximately twenty times just to secure drug convictions.

the course of investigative practices and policies.³ It is imperative that the penumbra of the Fourth Amendment be preserved and protected:

"The high technology, electronic age in which we live highlights and exacerbates the historical tension between liberty and order. In this opinion we have attempted to bestow upon the right to privacy the dignity and primacy that it deserves, while cautioning governmental authorities that obedience to the law is essential lest respect for the law diminish to a point of nonexistence. To permit the government to invade the constitutional rights of its citizens is too high a price to pay for law enforcement. Certainly law enforcement officers must have powers and authorities, but we must be parsimonious and niggardly in opening up the private elements of our lives in the name of catching a marijuana salesman or two. We must be careful not to mutilate the fourth amendment bit by bit and piece by piece, until it is relegated to a position of near obscurity."

U. S. v. Butts, *supra*, at pp. 1152-53.

CONCLUSION

It is hard to imagine that our society can be truly free from unreasonable searches and seizures when same is contingent upon the real, imagined, or manufactured good faith of law enforcement officers. The goal of punishing the guilty must not be achieved at the expense of sacrificing the fundamental law of the land.

3. With the onslaught of modern technology, the various law enforcement agencies have resorted to and the Courts have approved the latest forms of sophisticated gadgetry to aid in the detection of crime. *U. S. v. Knotts*, ____ U.S. ____, 103 S.Ct. 1081 [beeper]; *U. S. v. Butts* (5th Cir. 1983) 710 F.2d 1139 (rehearing *en banc* granted [transponder]; *U. S. v. Alfrey* (5th Cir. 1980) [night vision devices].

"In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less important."

Coolidge v. New Hampshire, 403 U.S. 443, 455.

The decision in this case will be of profound importance to each and every citizen in our nation as it will dictate the future course of conduct to be followed by law enforcement personnel. *Amici* vehemently urges the Court to reject the Petitioner's proposed good faith exception to the exclusionary rule and affirm the Ninth Circuit's decision.

Respectfully submitted,

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No. 82-1771-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Alberto Antonio Leon, et al.

Docketed:
April 29, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Kaplan, Norman J., Abzug, Michael D.,
Cossack, Roger L., Lichtman, Jay L.

Entry	Date	Note	Proceedings and Orders
1	Apr 29 1983	G	Petition for writ of certiorari filed.
2	May 24 1983		Brief of respondents Armando Sanchez, et al. in opposition filed.
3	Jun 1 1983		DISTRIUTED. June 16, 1983
6	Jun 22 1983		DISTRIUTED. June 23, 1983
7	Jun 27 1983		Petition GRANTED.

8	Jul 1 1983		Application to exceed page limits on petitioner's brief on merits filed with WHR (A-1072).
9	Jul 6 1983		Order granting same not to exceed 60 pages by Rehnquist, J.
11	Jul 13 1983		Order extending time to file response to petition until September 10, 1983.
12	Aug 8 1983		Joint appendix filed.
13	Aug 10 1983		Brief amicus curiae of The People of the State of California filed.
14	Aug 26 1983		Leave to file consolidated brief on the merits in excess of page limits filed with WHR (United States) A-144.
15	Aug 29 1983		Order granting same. Brief not to exceed 90 pages by Rehnquist, J. (A-144)
17	Sep 9 1983		Brief of petitioner United States in 82-0963,1711 filed.
18	Sep 12 1983		Brief amicus curiae of Natl. District Attorneys Assn. in 82-0963,1711 filed.
19	Sep 10 1983		brief amicus curiae of Criminal Justice Legal Foundation filed.
20	Sep 10 1983		Brief amicus curiae of Seven Members of AG's Task Force, et al. in 82-0963,1711 filed.
21	Sep 12 1983		Brief amicus curiae of Kansas, et al. filed.
22	Sep 23 1983	G	Motion of respondents for divided argument filed.
23	Sep 23 1983	D	Motion of respondents for additional time for oral argument filed.
25	Sep 27 1983		Order extending time to file response to petition until November 14, 1983.
26	Oct 11 1983		Motion of respondents for divided argument GRANTED.
27	Oct 11 1983		Motion of respondents for additional time for oral argument DENIED.
28	Oct 24 1983		Leave to file brief on the merits in excess of the pages of respondents Sanchez, Stewart and Castillo with WHR.
29	Oct 25 1983		Order granting same not to exceed 75 pages by Rehnquist, J., (A-299).
30	Oct 28 1983		Application for leave to file respondent's brief on the

Entry	Date	Note	Proceedings and Orders
31	Oct 28 1983	merits of Leon in excess of page limits and order granting same by Rehnquist, J., 10/31/83 - not to exceed 75 pages.	
32	Nov 3 1983	Order further extending time to file response to petition until November 28, 1983.	
33	Nov 10 1983	Brief amicus curiae of NAACP, et al. filed. VIDE.	
34	Nov 14 1983	Brief amicus curiae of Minnesota State Bar Association filed.	
35	Nov 14 1983	Brief amicus curiae of Assn. of Trial Lawyers of America filed.	
36	Nov 12 1983	Leave to file respondent's brief on the merits in excess of the page limits of Alberto A. Leon filed with WHR.	
37	Nov 15 1983	Order denying same by Rehnquist, J. (2nd request).	
38	Nov 21 1983	Brief amicus curiae of National Legal Aid and Defender Association filed. VIDE.	
39	Nov 22 1983	Brief of respondents Sanchez, et al. filed.	
40	Nov 23 1983	Brief amicus curiae of Bar Assn. of San Francisco, et al. filed. VIDE.	
41	Nov 23 1983	Brief amicus curiae of Committee on Criminal Law, etc. filed. VIDE.	
43	Nov 23 1983	SET FOR ARGUMENT. Tuesday, January 17, 1984. (3rd case)	
44	Nov 25 1983	Brief amicus curiae of Arkansas Trial Lawyers Assn., filed.	
45	Nov 26 1983	Brief amicus curiae of Illinois State Bar Association filed. VIDE.	
46	Nov 28 1983	Brief of respondent Alberto A. Leon filed.	
47	Nov 28 1983	Brief amicus curiae of National Assn. of Criminal Defense Lawyers, et al. filed. VIDE.	
48	Nov 28 1983	Brief amicus curiae of Texas Criminal Defense Lawyers Association, et al. filed.	
49	Dec 1 1983	CIRCULATED.	
50	Nov 28 1983	Brief amicus curiae of Dan Johnston, etc. filed. VIDE.	
51	Dec 5 1983	Motion of respondents Sanchez, et al. for modification of order granting divided argument filed.	
52	Dec 12 1983	Motion of respondents Sanchez, et al. for modification of order granting DENIED.	
53	Dec 22 1983	Application for leave to file petitioner's reply brief on the merits in excess of page limitations, and order granting same not to exceed 30 pages, by Rehnquist, J., Dec. 23, 1983.	
54	Dec 22 1983		
55	Jan 5 1984	X Reply brief of petitioner United States filed.	
56	Jan 17 1984	ARGUED.	